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No. _____

In the Supreme Court of the United States

VICTOR MCKEEVER, PETITIONER

v.

WARDEN SCI-GRATERFORD, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plea agreement that is based on the parties' mutual mistake about an essential element of charges to which the defendant pled guilty is constitutionally invalid and voidable at the option of the defendant?

PARTIES TO THE PROCEEDINGS

Victor McKeever was the petitioner-appellant in the court below. The Warden of SCI-Graterford, the Attorney General of the Commonwealth of Pennsylvania, and the District Attorney of Erie County, Pennsylvania were the respondents-appellees in the court below. There are no other parties.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL PROVISION INVOLVED 4

STATEMENT 4

REASONS FOR GRANTING THE PETITION 7

I. The Decision Below Conflicts With Decisions From Other Federal Circuits And State Appellate Courts 8

A. Seventh Circuit 8

B. Ninth Circuit 11

C. Tenth Circuit 12

D. State Courts 14

II. The Decision Below Conflicts With This Court's Position That A Mutual Mistake About An Essential Element Of The Charged Offense Is Necessarily Material To The Plea Agreement 17

A. A Mutual Mistake About an Essential Element of the Charged Offense Renders a Guilty Plea Involuntary and Unintelligent 17

B. Under General Contract Principles, a Mutual Mistake About the Criminality of the Charged Conduct Is Necessarily Material to the Plea Agreement and Renders the Agreement Voidable 18

III. The Question Presented Is Exceptionally Important To State And Federal Criminal Justice Systems 23

CONCLUSION 25

APPENDIX A – Court of Appeals Opinion 1a

APPENDIX B – District Court Opinion 35a

APPENDIX C – Order Denying Rehearing 44a

TABLE OF AUTHORITIES

Page(s)

CASES

Bailey v. *United States*,
516 U.S. 137 (1995) 11

Bousley v. *United States*,
523 U.S. 614 (1998) ..... *passim*

Boykin v. *Alabama*,
395 U.S. 238 (1969) 17

Brady v. *United States*,
397 U.S. 742 (1970) 22

Brooks v. *United States*,
708 F.2d 1280 (7th Cir. 1983) 19

Clue v. *State*,
615 S.E.2d 800 (Ga. Ct. App. 2005) 15

Commonwealth v. *Besch*,
674 A.2d 655 (Pa. 1996) 4

Commonwealth v. *Shaffer*,
734 A.2d 840 (Pa. 1999) 5, 10

Coy v. *Fields*,
27 P.3d 799 (Ariz. Ct. App. 2001) 15

Hentz v. *Hargett*,
71 F.3d 1169 (5th Cir. 1996) 19

In re Alvernaz,
830 P.2d 747 (Cal. 1992) (*en banc*) 24

Jolly v. *State*,
392 So. 2d 54 (Fla. Dist. Ct. App. 1981)
(*per curiam*) 15

People v. *Hare*,
734 N.E.2d 515 (Ill. App. Ct. 2000) 15

People v. *Reynolds*,
2003 WL 22930597 (Cal. Ct. App. Dec. 12, 2003) 15

People v. *Sellers*,
635 N.Y.S.2d 773 (N.Y. App. Div. 1995) 16

Ricketts v. *Adamson*,
483 U.S. 1 (1987) 18-19

Rivers v. *Roadway Express, Inc.*,
511 U.S. 298 (1994) 5, 25

Rojas v. *State*,
450 A.2d 490 (Md. 1982) 16

Santobello v. *New York*,
404 U.S. 257 (1971) 19, 23-25

Smith v. *O'Grady*,
312 U.S. 329 (1941) 17

State v. *Alba*,
697 N.W.2d 295 (Neb. Ct. App. 2005) 15, 24

State v. *Chavez*,
636 P.2d 1220 (Ariz. 1981) (*en banc*) 14

State v. *Hart*,
2005 WL 77054 (Ohio Ct. App. Jan. 13, 2005) 15

State v. *Mazzone*,
572 S.E.2d 891 (W. Va. 2002) 16

State v. *Patience*,
944 P.2d 381 (Utah Ct. App. 1997) 15

State v. *Rachwal*,
1995 WL 455790 (Wis. Ct. App. Aug. 3, 1995)
(*per curiam*) 16

State v. *Turley*,
69 P.3d 338 (Wash. 2003) 15

Summers v. *State*,
212 S.W.3d 251 (Tenn. 2007) 16

United States v. *Ahn*,
231 F.3d 26 (D.C. Cir. 2000) 20

United States v. *Andis*,
333 F.3d 886 (8th Cir. 2003) 19

United States v. *[illegible]glin*,
215 F.3d 10[illegible] (7th Cir. 2000) 19

United States v. *Atkinson*,
979 F.2d 1219 (7th Cir. 1992) 10

United States v. *Barnes*,
83 F.3d 934 (7th Cir. 1996) 9

United States v. *Barron*,
127 F.3d 890 (9th Cir. 1997) 11

United States v. *Barron*,
172 F.3d 1153 (9th Cir. 1999) (*en banc*) 11-12

United States v. *Bradley*,
381 F.3d 641 (7th Cir. 2004) 8-9

United States v. *Bunner*,
134 F.3d 1000 (10th Cir. 1998) 13-14

United States v. *Cook*,
406 F.3d 485 (7th Cir. 2005) 10

United States v. *Gamble*,
917 F.2d 1280 (10th Cir. 1990) 19

United States v. *Gebbie*,
294 F.3d 540 (3d Cir. 2002) 19

United States v. *Howle*,
166 F.3d 1166 (11th Cir. 1999) 19

United States v. *Ingram*,
979 F.2d 1179 (7th Cir. 1992) 20

United States v. *Lewis*,
138 F.3d 840 (10th Cir. 1998) 12-13

United States v. *McQueen*,
108 F.3d 64 (4th Cir. 1997) 19

United States v. *Moulder*,
141 F.3d 568 (5th Cir. 1998) 14

United States v. *Ortiz-Santiago*,
211 F.3d 146 (1st Cir. 2000) 19

United States v. *Peterson*,
268 F.3d 533 (7th Cir. 2001) 9

United States v. *Ringling*,
988 F.2d 504 (4th Cir. 1993) 20

United States v. *Robison*,
924 F.2d 612 (6th Cir. 1991) 19

United States v. *Roque*,
421 F.3d 118 (2d Cir. 2005) 19

United States v. *Ruiz*,
536 U.S. 622 (2002) 22

United States v. *Sandles*,
80 F.3d 1145 (7th Cir. 1996) 10

United States v. *Williams*,
198 F.3d 988 (7th Cir. 1999) 10

CONSTITUTION, STATUTE, AND RULES

U.S. Const. amend. XIV 4

18 U.S.C. § 924(c) 8

28 U.S.C. § 1254(1) 3

Sup. Ct. R. 10(a) 7

Sup. Ct. R. 10(c) 7

OTHER AUTHORITIES

21 Am. Jur. 2d *Criminal Law* § 689 (1998) 20

Corbin on Contracts § 28.49 (rev. ed. 2002) 21

Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004* (Bureau of Justice Statistics, July 2007) 24

Restatement (Second) of Contracts § 151 (1979) 21

Restatement (Second) of Contracts § 152 (1979) 2, 20

Restatement (Second) of Contracts § 164 (1979) 19

Restatement (Second) of Contracts § 175 (1979) 19

Restatement (Second) of Contracts § 177 (1979) 19

Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992) 3, 25

U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* (2006) 23-24

Williston on Contracts § 70:125 (4th ed. 2003) 21

INTRODUCTION

Contrary to decisions of the Seventh, Ninth, and Tenth Circuits, decisions of several state courts, and this Court's own approach to guilty pleas, the decision below held that petitioner was not entitled to rescind a plea agreement that was based on the parties' mutual mistake about an essential element of two of the crimes to which petitioner pled guilty. According to the panel majority, this mistake about the criminality of petitioner's conduct was not material to his decision to plead guilty—even though the mistake exposed petitioner to an additional 14 years' potential imprisonment and even though this Court has made clear that a guilty plea based on a mutual mistake about an essential element of the charged offense renders the plea involuntary, unintelligent, or both. See *Bousley* v. *United States*, 523 U.S. 614, 618 (1998). Over a strong dissent, which acknowledged the circuit conflict on the issue, the panel majority then concluded that petitioner could be resentenced under the invalid plea agreement, as modified by the district court without petitioner's consent. This Court should grant review to establish clear rules defining the appropriate remedy when a criminal defendant pleads guilty to a charge of which he is actually innocent based on the parties' mutual mistake about an essential element of that offense.

The plea agreement under which petitioner was convicted and sentenced reflects the parties' shared assumption that petitioner was exposed to 14 years' imprisonment for violating the Pennsylvania Corrupt Organizations Act ("PACOA"), in addition to his exposure on various other charges. As the court below recognized, that fundamental assumption was mistaken: Less than a year after petitioner pled guilty to two counts of violating the PACOA, the Supreme Court of Pennsylvania held that the statute's definition of an "enterprise" did not apply to the kind of conduct at issue in this case. Thus, *as a matter of law*, petitioner could not have been convicted on the PACOA counts that were included in his plea agreement.

The result of the parties' mutual mistake about the criminality of petitioner's conduct was an unlawful conviction and sentence on the two PACOA counts. The district court and the court of appeals agreed that petitioner was entitled to *habeas corpus* relief from this unlawful judgment. Yet both courts concluded that petitioner could be resentenced pursuant to a modified agreement to which he never consented. The court below justified this result by asserting that the parties' mutual mistake about the criminality of petitioner's conduct was not *material* to his plea bargain.

As the dissent pointed out, that conclusion is wrong under this Court's own decisions and general principles of contract law. Plea agreements are constitutional contracts, and it is a cardinal principle of contract law generally that an agreement based on a mutual mistake is voidable at the option of the party adversely affected by the mistake. *See Restatement (Second) of Contracts* § 152 (1979). And where such a mistake relates to the *criminality* of the defendant's charged conduct—where "neither [the defendant], nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged"—this Court has made clear that the resulting plea agreement is "constitutionally invalid." *Bousley*, 523 U.S. at 618. In other words, a mutual mistake about an element of the charged offense must be material to a defendant's agreement to plead guilty to that offense. And an involuntary, unintelligent guilty plea cannot be remedied by a unilateral modification of the plea agreement.

Not only does the decision below depart from this Court's settled approach to plea agreements, but as the dissent recognized, but it also creates a circuit conflict—specifically, with decisions from the Seventh, Ninth, and Tenth Circuits, as well as numerous state appellate courts. These courts recognize that the parties' mutual mistake as to the basic premises of a plea agreement renders the entire agreement—not just parts of it—voidable.

Contrary to the decision below, these courts apply the rule that the appropriate remedy in cases of mutual mistake is voidance or rescission, not unilateral modification of the agreement. And this rule applies whether the government or the defendant would benefit from rescission of the agreement.

This Court's review is warranted to resolve the conflict between the decision below and these other courts' decisions on a question of law that affects plea negotiations in state and federal courts nationwide. The question presented is especially important in light of the fact that more than 95 percent of all federal criminal cases, and more than 95 percent of all state felony cases, are resolved by plea agreements. Indeed, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992). The Court should grant the petition to ensure that plea bargains are conducted and enforced in a manner that ensures the voluntariness and intelligence of the guilty pleas that result.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Third Circuit are reported at 486 F.3d 81 and reprinted at Pet. App. 1a-34a. The Third Circuit's order denying rehearing and rehearing *en banc* is not reported but is reprinted at Pet. App. 44a-45a. The opinion of the United States District Court for the Eastern District of Pennsylvania (Diamond, J.) is not reported but is available at 2005 WL 696893 and is reprinted at Pet. App. 35a-43a.

JURISDICTION

The court of appeals entered its judgment on May 10, 2007 and denied rehearing and rehearing *en banc* on June 6, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT

1. In 1995, the Commonwealth of Pennsylvania charged petitioner with six counts of delivery of a controlled substance, one count of dealing in proceeds of unlawful activities, one count of conspiracy to violate Pennsylvania's Drug Act, one count of possession of a controlled substance, and two counts of violating the PACOA. The PACOA charges were based on the Commonwealth's allegation that petitioner participated in an organization that was solely devoted to heroin distribution. The PACOA counts carried a maximum sentence of 14 years' imprisonment.

In exchange for petitioner's plea of guilty to all the charges but one, the Commonwealth promised not to object to a sentencing scheme described in the plea agreement. According to the agreement, the sentences on the drug delivery counts would run consecutively with each other and concurrently with the sentences on the drug dealing and conspiracy counts. The sentences on the two PACOA counts would be merged together and would run concurrently with the sentence on one of the drug delivery counts. The trial court accepted the parties' agreement and sentenced petitioner to 15-42 years' imprisonment.

2. Less than a year after the agreement took effect, the Supreme Court of Pennsylvania held that the PACOA "is directed at preventing the infiltration of legitimate business by organized crime" and thus does not cover a "wholly illegitimate enterprise" such as a drug trafficking enterprise. *Commonwealth* v. *Besch*, 674 A.2d 655, 655, 659-661 (Pa. 1996). Although the Pennsylvania legislature later amended the PACOA to cover such enterprises, the Supreme Court of Pennsylvania held that this

amendment did not apply retrospectively. See *Commonwealth* v. *Shaffer*, 734 A.2d 840, 843-844 (Pa. 1999). Because the court's interpretation of the PACOA in *Besch* "became a part of the legislation from the date of its enactment," petitioner's conduct could not have violated the PACOA. *Id.* at 844; accord *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction"). Thus, as a matter of law, petitioner was *actually innocent* of the PACOA charges that were included in his plea agreement.

Petitioner sought post-conviction relief in the Court of Common Pleas, arguing that his guilty plea was based on a mutual mistake; he was not liable for violating the PACOA because his drug trafficking business was not an "enterprise" under the statute; and his guilty plea therefore should be rescinded. The court dismissed the post-conviction petition as untimely under state law, and the Superior Court affirmed that decision.

3. Petitioner then filed a petition under 28 U.S.C. § 2254 in the Eastern District of Pennsylvania, alleging that his conviction violated due process because he was actually innocent of the PACOA counts that were included in his plea agreement. The district court excused petitioner's untimely filing because he was "actually innocent" of the PACOA charges. Pet. App. 38a. The court granted *habeas* relief but stayed the writ "to permit the Commonwealth to vacate [p]etitioner's convictions related to the [PACOA] and resentence him accordingly." Pet. App. 42a. The state court then vacated petitioner's convictions on the PACOA counts and resentenced petitioner to the same 15-42 years' imprisonment. Pet. App. 6a.

A panel of the court of appeals granted a certificate of appealability to determine "whether the District Court erred in ordering the release of [p]etitioner unless the Commonwealth of Pennsylvania vacates [his] convictions under [the PACOA] and resentences him accordingly,

rather than ordering the Commonwealth to allow him to withdraw his guilty plea as to all offenses." A majority of the merits panel held that although general contract principles apply to the question presented, petitioner was not entitled to rescind his plea agreement because the parties' mutual mistake about the applicability of the PACOA was "not material" to the plea agreement. Pet. App. 9a. And since the PACOA charges were "not an essential part of the agreed exchange," the majority concluded that "rescission of the plea is not necessary and the Commonwealth did not err in vacating the two PACOA counts and resentencing [petitioner] based upon the remainder of the plea agreement." Pet. App. 14a.

Judge Roth dissented, pointing out that "the plea agreement here, negotiated and entered into on the basis of a shared misapprehension as to the reach of one of the statutes under which the defendant is charged, is voidable as based on a material mutual mistake." Pet. App. 15a. Specifically, Judge Roth disagreed with the majority's conclusion that the Constitution permitted the state court merely to resentence petitioner based on a modified plea agreement (not including the PACOA charges) rather than allowing petitioner to rescind the agreement altogether. In her view, petitioner's agreement to plead guilty to all the charges was a package deal that could not be deconstructed in piecemeal fashion: "That the drug trafficking counts constituted the heart of the *sentence* [petitioner] received does not necessarily mean that they also constituted the heart of the *bargain* * * * * The two PACOA counts represented a potential additional prison term of fourteen years; the mistake as to whether his conduct was criminal under the PACOA could not have been immaterial." Pet. App. 29a.

According to Judge Roth, this Court's decision in *Bousley*, as well as decisions from the Seventh, Ninth, and Tenth Circuits compelled the conclusion that "a misapprehension shared by the defendant, his counsel, the prosecutor, and the trial court as to the reach of the statute con-

stitutes a mutual mistake with material effects on the bargain, so that the entire plea agreement becomes voidable at the petitioner's request and the parties are returned to their pre-plea positions." Pet. App. 19a.

The majority responded to Judge Roth's dissent by arguing that decisions from this Court and the Seventh Circuit did not "address the due process implications of vacating counts based upon a subsequent change in the law that rendered the defendant actually innocent of those counts, and holding a defendant to his admissions of guilt on other properly charged and correctly understood counts for which there is no evidence of actual innocence." Pet. App. 11a. But the majority failed to explain how a mutual mistake about an essential element of a charged offense that renders a guilty plea to that offense involuntary, unintelligent, or both—as this Court explained in *Bousley*—nevertheless would not be material to the defendant's decision to enter into a plea agreement. Unfortunately, the broad statement quoted above is the majority's sole response to *Bousley*. The majority also attempted to distinguish the other contrary decisions identified by Judge Roth, but (as explained below) the purported distinctions make no difference here.

Petitioner requested rehearing and rehearing *en banc*, but the court of appeals denied those requests. Pet. App. 44a-45a.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted because the decision below—holding that a guilty plea is not materially affected by a mutual mistake as to the defendant's actual innocence of the charged offenses—conflicts with decisions from at least three other federal circuits and state courts as well. See Sup. Ct. R. 10(a). Moreover, the decision below conflicts with this Court's own decisions addressing the validity of guilty pleas. See Sup. Ct. R. 10(c). These conflicts are intolerable given the undeniable practical importance of the question presented—an importance that

arises from the fact that more than 95 percent of federal criminal cases, and more than 95 percent of state felony cases, result in guilty pleas.

I. The Decision Below Conflicts With Decisions From Other Federal Circuits And State Appellate Courts.

This Court's review is necessary to resolve a clear conflict between the decision below and decisions from other federal and state courts of appeals. Contrary to the decision below, the Seventh, Ninth, and Tenth Circuits have recognized that rescission or voidance of the plea agreement, at the defendant's option, is appropriate when a plea agreement is entered based on a mutual mistake as to an essential element of a charged crime. Several state courts take the same approach. This Court should grant the petition and decide once and for all that a defendant who pleads guilty to a crime of which he was actually innocent—pursuant to an agreement based on the parties' mutual mistake as to the criminality of his conduct—must be given the option to rescind the entire agreement.

A. Seventh Circuit

There can be little doubt that petitioner would have prevailed had his case arisen within the Seventh Circuit. under that court's decisions. For example, in *United States* v. *Bradley*, 381 F.3d 641 (7th Cir. 2004), the defendant was indicted on one count of possession of cocaine with intent to distribute and one count of knowing use and carrying of a firearm during and in relation to a drug trafficking crime (in violation of 18 U.S.C. § 924(c)), "to wit: the knowing and intentional possession * * * of cocaine base with intent to deliver." *Id.* at 643. In his plea agreement, however, the defendant admitted that he had carried a firearm in relation to his possession of marijuana, not cocaine. *Ibid.* Notwithstanding this variance from the specific charge in the indictment, the district court accepted the defendant's guilty plea to the firearms count. The defendant later moved to withdraw his guilty

plea, the district court denied the motion, and on appeal the Seventh Circuit reversed.

At the outset, the court observed that a guilty plea is not knowing or voluntary "unless the defendant received real notice of the true nature of the charge against him." *Id.* at 645 (quotations omitted). And "[w]hen there is no evidence that the requisite elements of the charged offense were comprehended by any party to the proceeding, confidence in the defendant's understanding of that charge certainly is undermined." *Id.* at 646-647. Recognizing that "Mr. Bradley was misinformed during the change-of-plea hearing as to what conduct would suffice to establish the § 924(c) offense with which he was charged," the court held that his guilty plea was "not made knowingly and intelligently." *Id.* at 646-647.

Turning to the question of remedy, the Seventh Circuit held that "the defect inherent in the * * * § 924(c) plea taints the guilty plea to the [drug trafficking] offense as well." *Id.* at 648. As the court explained, "Mr. Bradley entered into the plea agreement as a whole, pleading guilty to both counts in exchange for certain promises from the Government." *Ibid.* And "'when the government proposes a plea agreement, when the defendant accepts it and when the district court enforces it, there must be a meeting of minds on all of its essential terms.' Among the essential terms is the 'nature of the charge to which the defendant pleads.'" *Ibid.* (quoting *United States* v. *Barnes*, 83 F.3d 934, 938 (7th Cir. 1996) (citations omitted). Because "[b]oth parties were mistaken as to the nature of the § 924(c) charge against Mr. Bradley"—"an essential element of the plea agreement"—the Seventh Circuit held that "the entire agreement is invalidated." *Ibid.* (citing *Barnes*, 83 F.3d at 941) ("If we rule that some provision of the plea agreement is invalid, we must discard the entire agreement"); see *United States* v. *Peterson*, 268 F.3d 533, 534 (7th Cir. 2001) (Easterbrook, J.) ("The whole plea agreement stands, or the whole thing falls").

The analysis in *Bradley* is consistent with a long line of Seventh Circuit decisions affirming that a plea agreement reflecting a mutual mistake is voidable at the option of the party adversely affected by the mistake. See, *e.g.*, *United States* v. *Cook*, 406 F.3d 485, 487-488 (7th Cir. 2005) (Posner, J.) ("There are other grounds for rescinding a plea agreement besides ineffective assistance of counsel, such as mutual mistake. A plea agreement is a contract, and like any contract can be rescinded on the basis of such a mistake"); *United States* v. *Williams*, 198 F.3d 988 (7th Cir. 1999) (holding that the appropriate remedy where a plea agreement reflected the parties' mutual mistake concerning the maximum sentence for the charged offenses was voidance, not reformation); *United States* v. *Sandles*, 80 F.3d 1145, 1148 (7th Cir. 1996) (affirming rescission of a plea agreement and stating that "[w]here there is a mutual misunderstanding as to the material terms of a contract, the appropriate remedy is rescission, not unilateral modification"); *United States* v. *Atkinson*, 979 F.2d 1219, 1222-1223 (7th Cir. 1992) (rejecting the government's request to modify a plea agreement based on the parties' mutual mistake relating to the defendant's criminal history, because that remedy "is appropriate only when the contract fails to reflect accurately the terms of the agreement").

The court below attempted to distinguish *Bradley* on the ground that it did not involve a change in law resulting in the defendant's actual innocence of the offense of conviction. Pet. App. 11a. But that is no distinction at all: Because the Supreme Court of Pennsylvania's interpretation of the PACOA in *Besch* "became a part of the legislation from the date of its enactment," *Shaffer*, 734 A.2d at 844, the parties in this case were mistaken *at the time they entered the plea agreement*, just as the parties in *Bradley* were mistaken when they entered their agreement. Applied to the facts of petitioner's case, *Bradley* would compel rescission of the plea agreement.

B. Ninth Circuit

Petitioner also could have rescinded his plea agreement had his case arisen in the Ninth Circuit under that court's decision in *United States* v. *Barron*, 172 F.3d 1153 (9th Cir. 1999) (*en banc*). The defendant there pled guilty to three charges, including a § 924(c) charge. In light of this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995)—which held that § 924(c) requires "active employment" of a firearm in connection with a drug trafficking offense—the defendant sought to vacate his conviction on the § 924(c) count while retaining the other benefits of his plea agreement. The district court, however, vacated the entire sentence.

The original panel affirmed, explaining that "[a] set of convictions and sentences entered pursuant to a plea agreement may be viewed as part of a 'package' deal, considered and approved by the court. * * * Because the district court cannot possibly know what convictions or sentences Barron would have received had he not pleaded guilty to the section 924(c) count or had the district court refused to accept his guilty plea, an appropriate remedy is to put Barron in the position he was in before he entered into the plea agreement or before the district court accepted the plea based on conduct which did not constitute the crime charged." *United States* v. *Barron*, 127 F.3d 890, 895 (9th Cir. 1997).

The *en banc* Ninth Circuit did not disagree with this reasoning in the abstract but reversed the outcome in Barron's case—holding that the district court was not authorized to vacate the entire sentence *only because Barron had not requested such broad relief*. 172 F.3d at 1158. "Barron's motion purely and simply asked the district court to vacate a conviction that was void as a matter of law. The motion did not attack the plea agreement in any way. The motion did not assert that Barron had entered the plea agreement unknowingly and involuntarily." *Ibid.* Given these circumstances, the *en banc* court held that the district court was not authorized "to invent a new basis for

Barron's motion." *Ibid.* The court acknowledged, however, that "the argument that plea bargains must be treated as a package logically applies * * * in cases in which a petitioner challenges the entire plea as unknowing or involuntary." 172 F.3d at 1160.

Of course, that is exactly what petitioner did here. Petitioner sought *habeas* relief on the ground that he was actually innocent of the PACOA charges to which he had pled guilty and that his plea agreement resulted from a mutual mistake. On these facts, the Ninth Circuit would grant the remedy requested by petitioner, rescinding the plea agreement in its entirety rather than allow the district court to modify the agreement without petitioner's consent.

Although the majority below relied heavily on *Barron* to support its argument for divisible plea agreements—even suggesting that *Barron* requires the result reached below—the majority failed to acknowledge that *Barron* is limited to its facts. See Pet. App. 12a-13a. The *en banc* court in *Barron* could not have been clearer: Barron's § 2255 motion "did not assert that Barron had entered the plea agreement unknowingly and involuntarily. The motion did not assert that his conviction of use of a gun was unconstitutional. * * * It is only the analysis of the district that turned this simple motion into something more, a challenge to the plea agreement. The district court had no authority to invent a new basis for Barron's motion and erred in doing so." 172 F.3d at 1158. That is the holding of *Barron*; all else is *dicta*. Even so, the court in *Barron* recognized—contrary to the majority below—that a plea agreement may be considered an indivisible "package deal" where the defendant actually challenges the validity of the agreement, as petitioner did here. See *id.* at 1160.

C. Tenth Circuit

Petitioner also would have prevailed had his case arisen in the Tenth Circuit. For example, in *United States* v. *Lewis*, 138 F.3d 840 (10th Cir. 1998), the defendant had

been charged with multiple counts of drug and firearms offenses. The defendant pled guilty to a single count of using a firearm in relation to a drug trafficking offense in violation of § 924(c), in exchange for the government's dismissing ten other counts. When this Court decided *Bailey*—significantly limiting the reach of § 924(c)—the defendant sought relief under 28 U.S.C. § 2255 on the ground that he had been convicted for conduct that was not, in fact, criminal. The government argued that if the § 924(c) conviction were vacated, the entire plea agreement must be voided. The district court held that the defendant was entitled to void the plea agreement and withdraw his guilty plea, but the government would be able to prosecute him for the charges it had previously dismissed.

On appeal, the Tenth Circuit affirmed. Given the "broad and flexible remedial power conferred on the district court by section 2255 together with the interdependence of the various counts disposed of in a plea agreement," the district court was authorized "to vacate an entire plea agreement when a conviction that is part of the plea package is vacated." *Id.* at 842. The court explained that "the realities of plea bargaining" support the conclusion that a plea agreement disposing of multiple counts is a package deal that cannot be deconstructed and reformed count-by-count. *Id.* at 843. As Judge Roth observed in her dissenting opinion below, "the point in *Lewis* is that when there is a plea bargain, the court must look to the entire agreement and not simply to the end result." Pet. App. 22a n.16.

The Tenth Circuit reached a similar conclusion in *United States* v. *Bunner*, 134 F.3d 1000 (10th Cir. 1998), where the defendant pled guilty to a § 924(c) charge in exchange for the government's dismissing several other charges. This Court's decision in *Bailey* made the defendant actually innocent of the § 924(c) charge, and the district court granted his motion to vacate his sentence. The government then moved to reinstate the charges that it had previously dismissed, arguing that the defendant had

breached the plea agreement by challenging his sentence. The district court granted that motion on the ground that the defendant had repudiated the plea agreement.

On appeal, the Tenth Circuit held that although there was no repudiation of the plea agreement, this Court's decision in *Bailey* rendered the defendant's agreed promises meaningless. The court explained that "[a] basic assumption underlying the parties' purposes was their belief that the conduct Defendant pled guilty to amounted to a violation of § 924(c). * * * Indeed, under Fed. R. Crim. Proc. 11(f), the district court could not enter judgment on Defendant's plea absent a finding that a factual basis supported the § 924(c) violation." *Id.* at 1005. *Bailey*, however, "destroyed the factual basis supporting Defendant's conviction," leaving the defendant with two specific options: "He could perform under the agreement as though *Bailey* were never decided or he could move to vacate his sentence pursuant to § 2255 on the ground that he pled guilty to something that wasn't a crime." *Ibid.* Here again, the Tenth Circuit held that the parties' mistaken assumption about the required elements of the offense of conviction resulted in an agreement that could be voided at the defendant's option. See also *United States* v. *Moulder*, 141 F.3d 568, 571-572 (5th Cir. 1998) (following *Bunner* and holding that "the parties' assumptions and obligations were altered by *Bailey* and [the defendant's] successful § 2255 challenges," resulting in a frustration of purpose that vitiated the plea agreement).

D. State Courts

The decision below also conflicts with decisions from several state appellate courts. Several state courts have concluded that a plea agreement based on the parties' mutual mistake must be voided or rescinded; reformation or modification is not appropriate. See, *e.g.*, *State* v. *Chavez*, 636 P.2d 1220, 1221 (Ariz. 1981) (*en banc*) ("We find the existence of a New Mexico parole violation crucial to this plea agreement and hold that if the parties to a plea bargain were mistaken as to the existence of a material factor

which caused them to enter the agreement, and this material factor is discovered after sentencing, the defendant can withdraw his guilty plea if such action is necessary to prevent manifest injustice"); *People* v. *Reynolds*, 2003 WL 22930597, at *2 (Cal. Ct. App. Dec. 12, 2003) ("when a plea agreement is based on the mutual mistake of all concerned, the proper remedy is to allow for the withdrawal of the agreement"); *Jolly* v. *State*, 392 So. 2d 54, 56 (Fla. Dist. Ct. App. 1981) (*per curiam*) (allowing the government to rescind a plea agreement where the parties were mutually mistaken as to the applicability of a mandatory-minimum sentence); *People* v. *Hare*, 734 N.E.2d 515, 519 (Ill. App. Ct. 2000) (rejecting the defendant's request to modify his plea agreement after the sentence was found illegal; "[i]f the contract accurately reflects the parties' intent, but that intent resulted from a mutual mistake of fact, the proper remedy is rescission, not reformation"); *State* v. *Hart*, 2005 WL 77054, at *2 (Ohio Ct. App. Jan. 13, 2005) ("Since the parties made a mutual mistake in connection with the plea bargain agreement, we rescind it").[1]

Likewise, state courts have held that a negotiated plea agreement is a "package deal" that cannot be deconstructed or modified to account for an invalid guilty plea to one of the counts covered by the agreement. See, *e.g.*, *Clue* v. *State*, 615 S.E.2d 800, 803 (Ga. Ct. App. 2005) ("in many circumstances it is appropriate to view the final negotiated plea agreement as a 'package' deal, the terms of which should not be treated in isolation from one another but rather as a cohesive whole"); *State* v. *Turley*, 69 P.3d 338, 402 (Wash. 2003) ("We hold that when a defendant pleads

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[1] In applying the mutual mistake analysis to plea bargains, several state courts have held that the government, not the defendant, bears the risk of any mistake of law underlying the plea agreement. See, *e.g.*, *Coy* v. *Fields*, 27 P.3d 799, 803 (Ariz. Ct. App. 2001); *State* v. *Alba*, 697 N.W.2d 295, 307 (Neb. Ct. App. 2005); *State* v. *Patience*, 944 P.2d 381, 387-388 (Utah Ct. App. 1997).

guilty to multiple counts or charges at the same time, in the same proceedings, and in the same document, the plea agreement will be treated as indivisible, absent objective evidence of a contrary intent in the agreement").

And as the Supreme Court of Tennessee has explained, "[w]hen a plea agreement constitutes a package deal, an illegal sentence imposed on one of the plea offenses generally invalidates the entire plea agreement. Thus, as a general rule, when a plea agreement includes an illegal sentence, a defendant is entitled to withdraw the guilty plea." *Summers* v. *State*, 212 S.W.3d 251, 258 (Tenn. 2007); see also *Rojas* v. *State*, 450 A.2d 490, 494 (Md. 1982) ("Resentencing appellant to a prison term on the reduced charges would frustrate both parties' expectations. To avoid this, we find that the fairest remedy is to rescind the entire plea agreement"); *People* v. *Sellers*, 635 N.Y.S.2d 773, 774 (N.Y. App. Div. 1995) ("While the remainder of the sentence on the conspiracy charge was legal, because that was part and parcel of the plea bargain, it must also be vacated" and the defendant must be permitted to withdraw his guilty plea); *State* v. *Mazzone*, 572 S.E.2d 891, 897 (W. Va. 2002) ("The dismissals and the guilty pleas, while constituting two components of the plea agreement, were not entirely separate considerations. They were inextricably intertwined, and the plea agreement must be viewed as one unified agreement as we examine its validity"); *State* v. *Rachwal*, 1995 WL 455790, at *2 (Wis. Ct. App. Aug. 3, 1995) (*per curiam*) ("[S]ince the plea agreement was a package-deal, fairness to both parties requires us to allow Rachwal to withdraw his three no contest pleas. We will not speculate as to what the State would have offered, or what Rachwal would have accepted, had there initially been only four charges against him, rather than seven").

The decision below adopts an analysis of multi-count plea agreements that is inconsistent with these common principles, refusing to allow petitioner to rescind his plea agreement on the dubious ground that his invalid guilty

pleas to the PACOA counts were "immaterial" to his bargain with the Commonwealth. Not only would petitioner have fared better in the Seventh, Ninth, and Tenth Circuits, but he would have fared better in many state courts as well. This Court should resolve the conflict between the decision below and the decisions of these other federal and state appellate courts.

II. The Decision Below Conflicts With This Court's Position That A Mutual Mistake About An Essential Element Of The Charged Offense Is Necessarily Material To The Plea Agreement.

This Court's review is also necessary because the decision below departs from this Court's settled approach to analyzing guilty pleas. A guilty plea must be voluntary and intelligent, and this Court has made clear that a plea is not voluntary or intelligent where it results from the parties' mutual mistake about an essential element of the charged offense. If such a mutual mistake renders the plea involuntarily or unintelligently made, the mistake is necessarily material to the plea agreement under ordinary principles of contract law.

A. A Mutual Mistake About an Essential Element of the Charged Offense Renders a Guilty Plea Involuntary and Unintelligent.

To satisfy due process, a guilty plea must be "equally voluntary and knowing." *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). Because a guilty plea represents "an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Ibid.* Likewise, to ensure that a guilty plea is made knowingly or intelligently, the defendant must be accurately apprised of the "true nature of the charge against him." *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941). Accordingly, where "neither [the defendant], nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged," the defendant's guilty plea

cannot be voluntary or intelligent and thus is "constitutionally invalid." *Bousley*, 523 U.S. at 618-619.

The defendant in *Bousley* challenged his conviction for using a firearm in connection with a drug crime, in violation of § 924(c). While his appeal was pending, this Court held in *Bailey* that conviction under § 924(c) requires "active employment" of the firearm in relation to the drug offense. Bousley then argued that his guilty plea to a § 924(c) offense was not voluntary or intelligent because the district court failed to tell him that the government would have to prove "active employment" of the firearm. This Court remanded the case for a determination whether Bousley's petition had been procedurally defaulted. See *id.* at 623-624. Assuming that any default could be excused and Bousley could show that he did not "correctly underst[and] the essential elements of the crime with which he was charged," this Court concluded that his guilty plea would be "constitutionally invalid." *Id.* at 618-619.

Thus, under *Boykin*, *Smith*, and *Bousley*, a mutual mistake relating to an essential element of the charged offense renders the resulting guilty plea involuntary and unintelligent.

B. Under General Contract Principles, a Mutual Mistake About the Criminality of the Charged Conduct Is Necessarily Material to the Plea Agreement and Renders the Agreement Voidable.

This basic proposition—that a defendant cannot enter a voluntary and intelligent guilty plea unless he is aware of the criminality of his conduct under the relevant law—is consistent with this Court's analysis of plea agreements as "constitutional contracts." *Ricketts* v. *Adamson*, 483 U.S. 1, 16 (1987) (Brennan, J., dissenting). The majority in *Ricketts* explained that a plea agreement may be compared with "any other bargained-for exchange," *id.* at 9 n.5, and the dissent agreed that "the law of commercial

contract may in some cases prove useful as an analogy or point of departure in construing a plea agreement, or in framing the terms of the debate," *id.* at 16 (Brennan, J., dissenting).

1. This Court and the courts of appeals have applied general contract principles in analyzing guilty pleas. For example, this Court in *Bousley* explained that "a plea of guilty entered by one fully aware of the direct consequences of the plea is voluntary in a constitutional sense unless induced by threats * * * misrepresentation * * * or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business." 523 U.S. at 619 (quotations omitted). This rule is nearly identical to the basic principle of contract law that a contract is voidable by the adversely affected party if it was induced by fraudulent misrepresentations, duress, or undue influence. See *Restatement (Second) of Contracts* §§ 164, 175, 177. Similarly, this Court has held that where a defendant's guilty plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello* v. *New York*, 404 U.S. 257, 263 (1971) (emphasis added).

Following this Court's lead, the courts of appeals routinely apply ordinary contract principles in analyzing issues relating to plea agreements. See, *e.g.*, *United States* v. *Ortiz-Santiago*, 211 F.3d 146, 151 (1st Cir. 2000); *United States* v. *Roque*, 421 F.3d 118, 124 (2d Cir. 2005); *United States* v. *Gebbie*, 294 F.3d 540, 545 (3d Cir. 2002); *United States* v. *McQueen*, 108 F.3d 64, 66 (4th Cir. 1997); *Hentz* v. *Hargett*, 71 F.3d 1169, 1173 (5th Cir. 1996); *United States* v. *Robison*, 924 F.2d 612, 613 (6th Cir. 1991); *Brooks* v. *United States*, 708 F.2d 1280, 1281 (7th Cir. 1983); *United States* v. *Andis*, 333 F.3d 886, 890 (8th Cir. 2003); *United States* v. *Anglin*, 215 F.3d 1064, 1067 (9th Cir. 2000); *United States* v. *Gamble*, 917 F.2d 1280, 1282 (10th Cir. 1990); *United States* v. *Howle*, 166 F.3d

1166, 1168 (11th Cir. 1999); *United States* v. *Ahn*, 231 F.3d 26, 35 (D.C. Cir. 2000).

Indeed, the courts of appeals have held that due process requires that a criminal defendant be given all the protections of private contract law *at a minimum*. As the Fourth Circuit has explained, "[p]lea bargains rest on contractual principles, and each party should receive the benefit of its bargain. Yet, the analysis of the plea agreement must be conducted at a more stringent level than in a commercial contract because the rights involved are generally fundamental and constitutionally based." *United States* v. *Ringling*, 988 F.2d 504, 506 (4th Cir. 1993); see also *United States* v. *Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992) (plea bargains are "unique contracts and the ordinary contract principles are supplemented with a concern that the bargaining process not violate the defendant's right to fundamental fairness under the Due Process Clause"); 21 Am. Jur. 2d *Criminal Law* § 689 (1998) ("analysis of a plea agreement is conducted with greater scrutiny than i[s] a commercial contract").

2. It is a basic rule of contract law that a contract is voidable by the adversely affected party where "a mutual mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances." *Restatement (Second) of Contracts* § 152. There is no dispute that at the time this plea agreement was made, petitioner, his counsel, the prosecutor, and the trial court all mistakenly believed that petitioner could be liable under the PACOA and thus could be sentenced to an additional 14 years' imprisonment. That was a "basic assumption on which the contract was made," and it had a "material effect" on the exchange of performances, especially petitioner's agreement to plead guilty to the PACOA counts in

exchange for certain sentencing concessions from the Commonwealth.[2]

The decision below correctly acknowledged that a plea agreement may be voidable based on a mutual mistake. See Pet. App. 8a ("Ordinary contract law principles are applicable to disputes over plea agreements, provided that the defendant is also afforded the protections of due process"). But it failed to recognize that a mutual mistake about the *criminality of the defendant's conduct*—in this case, petitioner's participation in an "enterprise" under the PACOA—must be material to the defendant's agreement to plead guilty to the charges leveled against him. As this Court explained in *Bousley*, a mutual mistake as to the elements of the charged crime results in a "constitutionally invalid" plea. 523 U.S. at 619. In other words, that kind of mistake undermines the voluntariness and intelligence of the agreement to plead guilty and thus is always material to the defendant's decision to enter a guilty plea.

In this case, the parties' mistake was undoubtedly material to the bargain they ultimately struck. As Judge Roth explained in her dissenting opinion, "[t]he mutual mistake as to the reach of the PACOA caused McKeever to accept something valueless (the merger and concurrent sentence on the PACOA counts) in partial exchange for something valuable (his agreement not to contest the other counts). * * * [T]he mistake as to whether his con-

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[2] Contrary to the suggestion of the panel majority (Pet. App. 9a), whether the parties' mistake as to the PACOA's reach is properly described as a mistake of law or a mistake of fact is irrelevant. See *Restatement (Second) of Contracts* § 151 (defining "mistake" as "a belief that is not in accord with the facts"); *id.* cmt. b ("The rules stated in this Chapter do not draw the distinction that is sometimes made between 'fact' and 'law.' They treat the law in existence at the time of the making of the contract as part of the total state of facts at that time"); *Williston on Contracts* § 70:125 (4th ed. 2003); *Corbin on Contracts* § 28.49 (rev. ed. 2002).

duct was criminal under the PACOA could not have been immaterial." Pet. App. 29a.

3. Contrary to the conclusion of the panel majority, *Brady* v. *United States*, 397 U.S. 742 (1970), does not compel a different result. Of course it is true, as this Court explained in *Brady*, that a defendant is not entitled to withdraw his guilty plea "merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." 397 U.S. at 756-757. In this case, however, petitioner did not misapprehend "the quality of the State's case"; rather, all the parties to this plea agreement misunderstood an *essential element* of the PACOA charges, namely, the definition of the criminal "enterprise." As Judge Roth explained in her dissenting opinion, "Brady's lack of knowledge regarded the possible sentence, not the fact that he was *actually innocent* of the charges against him." Pet. App. 26a (emphasis added). Indeed, the Court in *Brady* emphasized that its rule would apply only where a court could be confident that defendants would not "falsely condemn" themselves. 397 U.S. at 757-758. But that is precisely what petitioner did here, based on his mistaken belief that the PACOA could be applied to his conduct.[3]

In sum, the decision below conflicts with this Court's clear statement in *Bousley* that a guilty plea resulting from a mutual mistake relating to an essential element of the charged offense cannot be a voluntary and intelligent plea and thus is invalid. And if such a mistake renders the resulting guilty plea involuntary and unintelligent, it

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[3] For the same reasons, this Court's recognition that due process does not require vitiation of a plea agreement for "various forms of misapprehension under which a defendant might labor," *United States* v. *Ruiz*, 536 U.S. 622, 630 (2002), is not applicable here. None of the "various forms of misapprehension" identified by the Court in *Ruiz* were mutual mistakes concerning the criminality of the defendant's conduct.

must be *material* to the defendant's agreement to enter the plea. This Court should grant the petition to vindicate the clear import of *Bousley* and this Court's contractual analysis of plea agreements.

III. The Question Presented Is Exceptionally Important To State And Federal Criminal Justice Systems.

This Court's resolution of the conflicts described above is all the more important because settled rules for plea bargaining are essential to the efficient administration of criminal justice in state and federal courts alike. As this Court observed in *Santobello*, plea bargaining "leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." 404 U.S. at 261. These practical benefits of plea bargaining are so important to the administration of criminal justice in state and federal courts that this Court expressly encouraged the practice. See *id.* at 260.

No doubt because of the real benefits it offers to both parties in a criminal case, plea bargaining is by far the preferred means to dispose of criminal charges. In fiscal year 2006, more than 95 percent of all federal criminal cases were resolved by guilty pleas. See U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, Fig. C (2006). Of 72,510 criminal cases filed in federal courts that year, guilty pleas were entered in 69,403 cases. See *id.* Table 10. In every federal circuit except the District of Columbia Circuit, guilty pleas disposed of more than 9 out

of 10 criminal cases.[4] See *id.* And in twenty different federal judicial districts, guilty pleas disposed of more than 97 percent of cases. See *id.*

Not surprisingly, guilty pleas are the predominant means for resolving a wide variety of federal criminal charges. In fiscal year 2006, 95.5 percent of all drug trafficking cases, and 95.8 percent of all drug possession cases, were disposed of through guilty pleas. U.S. Sentencing Comm'n, *supra*, Table 11. Nearly 99 percent of all criminal immigration cases were resolved through guilty pleas. See *id.* The numbers are similar for cases of larceny (97.4 percent), robbery (95.3 percent), fraud (94.9 percent), and forgery or counterfeiting (98.1 percent). Given the importance of plea bargaining in all kinds of federal criminal cases, this Court should ensure that the parties negotiate against a backdrop of clear rules, including rules about the appropriate remedy in the event of mutual mistake.

Plea bargaining is pervasive in state courts as well as federal courts. In 2004, state courts adjudicated nearly 1.1 million adult felony convictions, approximately 94 percent of the total number of felony convictions nationwide. Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004*, at 1 (Bureau of Justice Statistics, July 2007). Ninety-five percent of these felony convictions resulted from guilty pleas. *Id.* at 1-2. As the Supreme Court of California has observed, "plea bargaining is an integral component of the criminal justice system and essential to the expeditious and fair administration of our courts." *In re Alvernaz*, 830 P.2d 747, 752 (Cal. 1992) (*en banc*); accord *Santobello*, 404 U.S. at 264 (plea bargains "are important in the administration of justice both at the state and at the federal levels"); *Alba*, 697 N.W.2d

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[4] In the District of Columbia Circuit, guilty pleas were entered in 87.6 percent of criminal cases. See *id.* The figures for the other circuits range from 92 percent in the First Circuit to 97.4 percent in the Fifth Circuit. See *id.*

at 306 ("[p]lea bargaining is a well-established and, by now, virtually indispensable reality of the prosecution of criminal offenses" in state courts).

The question presented can be expected to recur in other cases in which state courts are called upon to define the elements of criminal statutes. Because a court's interpretation of a statute "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction," *Rivers*, 511 U.S. at 312, the mutual mistake scenario presented in this case could be repeated any time a court limits the scope of a criminal statute in a manner unforeseen by the parties to plea agreements.

Given the number of criminal charges to be resolved and the efficiencies gained from plea bargaining, this Court has recognized that plea bargaining is "an essential component of the administration of justice." *Santobello*, 404 U.S. at 260; see Scott & Stuntz, *supra*, at 1912 (plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system"). Establishing clear rules for plea bargaining—and prescribing the proper remedies in the event of a mutual mistake relating to the criminality of the defendant's conduct—is necessary to ensure that plea bargaining is "properly administered," *Santobello*, 404 U.S. at 260, and can continue to achieve significant efficiencies for prosecutors, defendants, and the courts alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2007

APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2492

VICTOR MCKEEVER,

Appellant

v.

WARDEN SCI-GRATERFORD;
ATTORNEY GENERAL,
COMMONWEALTH OF PENNSYLVANIA;
DISTRICT ATTORNEY, ERIE COUNTY

On Appeal from the Judgment of the
United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 04-cv-03567)
District Judge: Honorable Paul S. Diamond

Argued: February 1, 2007
Before: BARRY, ROTH, Circuit Judges, and
IRENAS,* Senior District Judge.
(Filed: May 10, 2007)

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* Honorable Joseph E. Irenas, Senior United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

IRENAS, Senior United States District Judge.

Appellant Victor McKeever pleaded guilty in 1995 to drug-related charges, including two counts arising under the Pennsylvania Corrupt Organizations Act ("PACOA"), 18 Pa. C.S.A. § 911(b)(3). He was sentenced to 15-42 years' imprisonment. In 1996, the Supreme Court of Pennsylvania held that PACOA does not apply to individuals operating wholly illegitimate businesses. *Commonwealth v. Besch*, 544 Pa. 1, 674 A.2d 655 (Pa. 1996). McKeever, falling within that class of persons, filed a habeas corpus petition on July 28, 2004, pursuant to 28 U.S.C. § 2254, in the Eastern District of Pennsylvania. He now appeals the District Court's Order granting his writ of *habeas corpus* and staying the writ for 180 days so that the Commonwealth of Pennsylvania could vacate McKeever's PACOA convictions and resentence him or, alternatively, release him from incarceration. For the reasons set forth below, we will affirm.

I.

The District Court had jurisdiction over McKeever's *habeas* petition under 28 U.S.C. § 2254. We have jurisdiction over his appeal pursuant to 28 U.S.C. §§ 1291, 2253. Because the District Court did not hold an evidentiary hearing on McKeever's sentencing claims, we review its legal conclusions *de novo*. *See Outten v. Kearney*, 464 F.3d 401, 413 (3d Cir. 2006); *Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir. 2001).

II.

On January 13, 1995, the Commonwealth of Pennsylvania filed an 11-count Information against McKeever arising out of his possession and delivery of heroin. (16).[1] He was charged with six counts of delivery of a controlled substance, one count of dealing in proceeds of unlawful activities, one count of criminal conspiracy to violate the state Drug Act, one count of possession of a controlled substance, and two counts of violating the Pennsylvania anti-racketeering statute, PACOA. McKeever pleaded guilty on July 24, 1995, to ten counts in exchange for the Commonwealth's promise not to object to a sentencing scheme set forth in the agreement.[2] (21). Under the scheme, McKeever's two PACOA counts merged with each other, and were made concurrent with one of the six drug delivery counts. They did not have any effect on the actual length of his sentence. The drug delivery counts were made consecutive with each other, and concurrent with the criminal conspiracy and drug dealing charges.[3]

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[1] The referenced page numbers correspond to Appellant's Appendix.

[2] At the time of McKeever's plea, the commonwealth withdrew Count XI, possession of a controlled substance. (49).

[3] The details of the sentencing scheme as set forth in the plea agreement are as follows: Count I (dealing in proceeds of unlawful activities): 1-5 years concurrent with Count V; Count

In 1996, the Supreme Court of Pennsylvania held that PACOA did not apply to individuals who operated wholly illegitimate businesses. *Commonwealth v. Besch*, 544 Pa. 1, 674 A.2d 655 (Pa. 1996). Later that year, the Pennsylvania legislature, responding to this interpretation, amended PACOA to apply to businesses with wholly illegitimate operations. (34-40); 18 Pa. C.S.A. § 911 (1997). In 1999, however, the Supreme Court of Pennsylvania held that the amended act was to be applied prospectively only. *Commonwealth v. Shaffer*, 557 Pa. 453, 734 A.2d 840, 843 (Pa. 1999).

McKeever, on January 23, 2003, collaterally challenged his sentence under the Pennsylvania Post Conviction Relief Act ("PCRA") asserting: (1) that his guilty plea was based upon mutual mistake of fact; (2) that he was not liable under PACOA because he operated a wholly illegitimate business; and (3) that his guilty plea should be rescinded.

The Court of Common Pleas, Erie County, dismissed the PCRA petition as untimely and not subject to any exceptions under 42 Pa. C.S.A. § 9545(b)(1). (80). It held that McKeever's petition would have been timely if filed by January 16, 1997, one year from the effective date of

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II (PACOA): 1-7 years merged with Count III and concurrent with Count V; Count III (PACOA): 1-7 years merged with Count II and concurrent with Count V; Count IV (criminal conspiracy): 2-7 years concurrent with Count V; Count V (delivery of a controlled substance): 2-7 years consecutive to McKeever's then current sentence; Count VI (delivery of a controlled substance): 2-7 years consecutive to Count V; Count VII (delivery of a controlled substance): 3-7 years consecutive to Count VI; Count VIII (delivery of a controlled substance): 2-7 years consecutive to Count VII; Count IX (delivery of a controlled substance): 3-7 years consecutive to Count VIII; Count X (delivery of a controlled substance): 3-7 years consecutive to Count IX.

the amendments to PACOA.[4] Because, however, it was filed on January 21, 2003, more than six years from that date, it was untimely. (82-83). The Superior Court of Pennsylvania affirmed. (87).

On July 28, 2004, McKeever filed a *habeas corpus* petition, pursuant to 28 U.S.C. § 2254, in the Eastern District of Pennsylvania. He alleged that under Pennsylvania statutory and case law, he was actually innocent of the two PACOA counts included in his plea agreement. (91-95). Magistrate Judge Hart issued a Report and Recommendation finding that the District Court had jurisdiction to hear the case, that McKeever should be excused from exhausting all state court remedies, that his petition was not time-barred, and that he was actually innocent of the two PACOA counts.[5] (126-32). Magistrate Judge Hart recommended that the District Court grant McKeever's petition and order the state court to vacate the two PACOA convictions and resentence McKeever accordingly. (132). McKeever objected to the Report and Recommendation of Magistrate Judge Hart, and argued that the appropriate remedy was the rescission of the 1995 plea agreement. (133).

On March 23, 2005, Judge Diamond issued an Order, with an attached Memorandum, adopting the Report and

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[4] Pursuant to 42 Pa. C.S.A. § 9545, a PCRA petition must be filed within one year of the date the judgment becomes final. Under a proviso of the 1995 amendments to the PCRA, if the judgment of sentence becomes final before January 1996, the effective date of the amendments, a petition has one year from the effective date of the act to file a first PCRA petition. McKeever qualified for this proviso, but failed to file his petition by January 16, 2007. (88-89).

[5] The Third Circuit has not yet decided whether a claim of actual innocence may equitably toll the one-year filing period under 28 U.S.C. § 2244(d). Because the Commonwealth conceded this issue, it is not before the Court at this time.

Recommendation by Magistrate Judge Hart, granting the writ of *habeas corpus* relief, and staying execution of the writ for 180 days to permit the Commonwealth to fashion the appropriate remedy. (3-4). McKeever moved to alter or amend the Order on the ground that the Commonwealth did not attach the District Court's memorandum when filing a Motion for Resentencing Hearing in the State Court on March 29, 2005. He asserted that in its motion, the Commonwealth misrepresented the District Court's Order, in that the Commonwealth stated that the District Court ordered re-sentencing, rather than leaving the remedy to the state's discretion. (159-161). The District Court, on April 11, 2005, denied McKeever's motion, noting again that it does not have the power to order the state to provide a specific remedy. (156). McKeever now appeals the District Court's Order.

On April 26, 2005, McKeever was resentenced in the Court of Common Pleas of Erie County to an aggregate term of 15 to 42 years in prison. The Court of Common Pleas denied various motions filed prior to re-sentencing, including a motion to withdraw his guilty plea.[6] (Appellee's App'x, Doc. A). McKeever appealed, and the Superior Court affirmed. (Appellee's App'x, Doc. B). McKeever then filed a petition for allowance of appeal, which was denied by the Supreme Court of Pennsylvania on September 13, 2006. *Commonwealth v. McKeever*, 589 Pa. 719, 907 A.2d 1101 (Pa. 2006).

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[6] In an opinion written by the Court of Common Please on June 29, 2005, the Court noted that McKeever's initial post-sentence motion on January 23, 2003, to withdraw his plea was untimely, and that even if it were timely, it should not now be granted because the plea was knowing, intelligent, and voluntary, and thus McKeever did not suffer prejudice as a result of the initial denial of his motion. (Appellee's App'x, 18-23).

III.

McKeever contends that his guilty plea violated the Due Process Clause, U.S. Const. Amend. 14, because it was not knowing and voluntary in light of the fact that, based upon a subsequent judicial decision, he was actually innocent of the two PACOA counts to which he pled guilty, and that the appropriate remedy is rescission of his guilty plea in its entirety.

First, we note that the District Court was correct in granting McKeever's writ of *habeas corpus* but leaving the precise remedy in the hands of the Commonwealth. "Both the historic nature of the writ and principles of federalism preclude a federal court's direct interference with a state court's conduct of state litigation. * * * A *habeas* court does not have power to directly intervene in the process of the tribunal which has incorrectly subjected the petitioner to the custody of the respondent official." *Barry v. Brower*, 864 F.2d 294, 300-01 (3d Cir. 1988) (internal citation omitted); *see also, Dunn v. Colleran*, 247 F.3d 450, 462 (3d Cir. 2001); *Dickerson v. Vaughn*, 90 F.3d 87, 92 (3d Cir. 1996) ("[A] state should be given the opportunity to correct its own errors and federal remedies should be designed to enable state courts to fulfill their constitutional obligations to the defendant."); *Heiser v. Ryan*, 15 F.3d 299, 306 (3d Cir. 1994).

In granting the writ of *habeas corpus*, the District Court left the choice of remedy to the state court. (11-13). McKeever argues that the District Court erroneously failed to order the state court to vacate his guilty plea in its entirety and either retry or release him. He contends that his guilty plea should be vacated in its entirety because it was premised on the belief of both parties that he was guilty of the two PACOA counts and was, therefore, neither voluntarily or intelligently made. However, *Brady v. United States*, 397 U.S. 742 (1970), held that a plea need not be vacated due to a subsequent change in

the statute upon which only part of the plea was premised.

> [J]udgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, *a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.*

Brady, 397 U.S. at 756-57 (internal citation omitted) (emphasis added). We decline to adopt a rule that renders a multi-count plea agreement *per se* invalid when a subsequent change in the law renders a defendant innocent of some, but not all, of the counts therein and reject the argument that such a plea could never be entered by a defendant voluntarily and intelligently.

McKeever suggests that because the plea agreement was based upon a mutual mistake, it should be rescinded. Ordinary contract law principles are applicable to disputes over plea agreements, provided that the defendant is also afforded the protections of due process. *See United States v. Floyd*, 428 F.3d 513, 516 (3d Cir. 2005); *see also, United States v. Bownes*, 405 F.3d 634, 636 (7th Cir. 2005); *United States v. Brunetti*, 376 F.3d 93, 95-96 (2d Cir. 2004) (per curiam); *United States v. Sar-Avi*, 255 F.3d 1163, 1166-67 (9th Cir. 2001); *United States v. Giorgi*, 840 F.2d 1022, 1025 (1st Cir. 1988). The Re-

statement (Second) of Contracts § 152 (1981) defines mutual mistake as follows:

> (1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a *material effect* on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.
>
> (2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

Id. (emphasis added).

First, this Court notes that contrary to McKeever's contention, the mistake here was one of law, not fact. Moreover, the mistake was not material. McKeever admits that had it not been for the mistake, he "may, or may not, have pleaded guilty rather than risk trial." (Appellant's Brief, 8). Pursuant to the Restatement (Second) of Contracts § 152 cmt. c (1981), "[i]t is not enough for [a party] to prove that he would not have made the contract had it not been for the mistake. He must show that the resulting imbalance in the agreed upon exchange is so severe that he can not fairly be required to carry it out." Based upon this standard and McKeever's own admission, the mistake of law clearly did not have a "material effect" on the plea agreement.

In *Brady*, the Supreme Court refused to vacate a plea agreement on the grounds that part of the statute to which petitioner pled was later deemed unconstitutional, despite the fact that petitioner may have relied upon it in informing his bargaining position. "[E]ven if we assume that Brady would not have pleaded guilty except for the death penalty provision of [the statute], this assumption merely identifies the penalty provision as a 'but for' cause of his plea. That the statute caused the plea in this sense

does not necessarily prove that the plea was coerced and invalid as an involuntary act." *Brady*, 397 U.S. at 750.[7] Thus, even if the PACOA counts informed McKeever's bargaining position, and were the "but for" cause of his decision to plead guilty, this does not rise to the level of materiality necessary to avoid the agreement in its entirety.

This conclusion is supported by the record, which reflects that the heart of McKeever's plea agreement was not the PACOA charges, but rather the drug trafficking charges. In fact, the bargain struck in the plea agreement resulted in a minimum sentence of fifteen years and a maximum of forty-two years. When resentencing, the Court sentenced McKeever to the same aggregate scheme, despite the removal of the PACOA counts. This occurred because, in the original sentencing scheme, the two PACOA counts were merged with each other and concurrent with a count for delivery of a controlled substance. They carried no mandatory minimum sentence, unlike each of Counts V through X, the delivery of a controlled substance counts. *See* 18 Pa. C.S.A. § 7508(a)(7)(i) and (ii). Nor did the PACOA counts carry a higher maximum sentence or a greater mandatory fine than Count I, which charged McKeever with dealing in the

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[7] The dissent attempts to distinguish *Brady*'s strong holding by suggesting that it can be marginalized because it did not involve a situation where, due to a subsequent change in the law, defendant was actually innocent of a law to which he pleaded guilty. Rather, it involved a subsequent determination that a law was invalid because it allowed defendant to avoid the death penalty by pleading guilty. In Brady, however, defendant's decision to plead guilty was based, at least in part, on the opportunity to avoid the death penalty. His failure to anticipate the change in law clearly had a much greater impact than it did on McKeever, where the PACOA counts neither impacted the length of his sentence nor were a central component of the bargain.

proceeds of unlawful activities. Moreover, the sentencing scheme and the nature of the crimes themselves make it clear that the prosecution of McKeever was fundamentally based upon his delivery of heroin.

The dissent assumes that the parties were mistaken as to the reach of PACOA at the time the plea was entered, and would require that the plea be voidable. The premise of the dissent's argument, however, is flawed. First, at the time the plea agreement was made, PACOA did, in fact, cover McKeever's conduct. No party was mistaken in his understanding of this. The law did not change until after McKeever pled and was sentenced.

In support of its theory, the dissent relies on *United States v. Bradley*, 381 F.3d 641 (7th Cir. 2004). In *Bradley*, defendant pled guilty to both counts of his two-count indictment. The Court of Appeals held that there was a mutual mistake when "no one understood an essential element of the crime with which Mr. Bradley was charged" *at the time* of the plea agreement. *Id.* at 647. Similarly, the dicta in *Bousley v. United States*, 523 U.S. 614 (1998), cited by the dissent, indicates that when a court accepts a guilty plea from a defendant to a crime, the elements of which neither he, his counsel, nor the court correctly understood, the plea would violate the Due Process Clause. *Id.* at 618-19. Neither of these decisions address the due process implications of vacating counts based upon a subsequent change in the law that rendered the defendant actually innocent of those counts, and holding a defendant to his admissions of guilt on other properly charged and correctly understood counts for which there is no evidence of actual innocence.

Second, the dissent relies upon its understanding that all pleas are packages, and thus an infirmity as to part of the plea causes the entire plea to become voidable. This understanding is erroneous both as to the contours of the sentencing package doctrine as well as to the circumstances of McKeever's plea agreement. The sentencing

package doctrine generally applies to sentences with interdependent, consecutive counts, and not to concurrent sentences. *See United States v. Murray*, 144 F.3d 270, 273-74 n.4 (3d Cir. 1998); *United States v. Davis*, 112 F.3d 118, 123 (3d Cir. 1997). Here, the precise agreement reached also demonstrates that the two PACOA counts on which McKeever was sentenced were independent of the other counts. The Court of Common Pleas sentenced McKeever separately on all counts. (55-76). The two PACOA counts were concurrent with one of the six drug delivery counts, which were consecutive with each other. The PACOA counts and the drug delivery counts clearly were not interdependent.

Even assuming, however, that Mckeever's sentence was a package, it is within the bounds of due process to resentence a defendant on remaining counts after some, but not all counts, are vacated. The decision in *United States v. Barron*, 172 F.3d 1153, 1158 (9th Cir. 1999) (en banc), is squarely on point. Barron pled guilty to three counts: Count I, felon in possession of a firearm, carrying a maximum of ten years, or a minimum of fifteen years' imprisonment if defendant had previously engaged in certain criminal conduct; Count II, possession of twenty-one ounces of cocaine with intent to distribute, with a sentence range of ten years to life imprisonment; and Count III, possession of a firearm in relation to drug trafficking pursuant to 18 U.S.C. § 924(c)(1), with a sentence of five years consecutive to any term of imprisonment imposed. Three years after he was sentenced, the Supreme Court decided *Bailey v. United States*, 516 U.S. 137 (1995), which held that use of a gun under § 924(c)(1) requires "active employment" of the gun in relation to the drug offense. Because Barron admitted to concealing a gun, but not to using the gun, the parties agreed that the facts did not justify his conviction on Count III.

Barron filed a § 2255 petition seeking *habeas* relief. The district court held that "Barron could have the plea

agreement set aside on the ground that it was not knowing and voluntary because of ignorance of the law declared by *Bailey*." *Barron*, 172 F.3d at 1156. A three-judge panel of the Ninth Circuit first affirmed,[8] but was then reversed in an *en banc* decision which held that "the guilty plea to criminal acts can remain in force even as the sentence imposed upon an innocent act is set aside. * * * [There is no] reason for reducing § 2255 remedies to two (discharge or new trial) when a plea agreement is in force. * * * [T]he district court can distinguish the convictions that are still valid, reinstate the judgment, and resentence." *Id.* at 1158. It further held that "a collateral challenge to the legality of a particular count of conviction does not constitute a breach of or withdrawal from a plea agreement, and * * * the remainder of the plea agreement remains in effect." *Id.* at 1160. Similarly, in *United States v. Watkins*, 147 F.3d 1294, 1298 (11th Cir. 1998), the court found no due process violation when defendant collaterally attacked one count of a package sentence imposed pursuant to a plea agreement, and the district court vacated that count and resentenced defendant on the remaining counts.

The dissent's reliance upon *United States v. Lewis*, 138 F.3d 840 (10th Cir. 1998), is misplaced. The plea in *Lewis* only covered one count. Thus, the issue of the constitutionality of vacating one count in a multi-count plea agreement simply was not before the court. Moreover, the *Lewis* court relied upon language in the *Barron* panel opinion, which had not yet been reversed *en banc*. *Lewis*, 138 F.3d at 841-43.

Contrary to McKeever's contention, rescission of the entire plea agreement was not the only appropriate remedy. This Court, in *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 219 (3d Cir. 2003), cited to the Restatement (First) of Contracts § 603 (1932) for the proposition that a "bargain

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[8] *United States v. Barron*, 127 F.3d 890 (9th Cir. 1997).

that is illegal only because of a promise or a provision for a condition, disregard of which will not defeat the *primary purpose* of the bargain, can be enforced with the omission of the illegal portion by a party to the bargain who is not guilty of serious moral turpitude unless this result is prohibited by statute." The Restatement (Second) of Contracts § 184 (1981), similarly states, "[i]f less than all of an agreement is unenforceable under the rule stated in § 178, a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange." Because we hold that the PACOA charges were not an essential part of the agreed exchange, rescission of the plea is not necessary and the Commonwealth did not err in vacating the two PACOA counts and resentencing McKeever based upon the remainder of the plea agreement.[9]

Furthermore, the mistake here—a later change in law that was beneficial to the Defendant—is not of the type that is *per se* sufficient for avoidance of the plea agreement, as the allocation of risk of future changes is part of the bargaining process. *See Bownes*, 405 F.3d at 636 ("In a contract (and equally in a plea agreement) one binds oneself to do something that someone else wants, in exchange for some benefit to oneself. By binding oneself one assumes the risk of future changes in circumstances in light of which one's bargain may prove to have been a bad one. That is the risk inherent in all contracts; they limit the parties' ability to take advantage of what may happen over the period in which the contract is in ef-

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[9] We also note that many of the cases the dissent relies upon involve *habeas* petitions that arise out of federal prosecutions pursuant to 28 U.S.C. § 2255. Such petitions do not implicate the federalism and comity issues of habeas petitions under 28 U.S.C. § 2254 that, in this case, support a remand to the state judge for determination of remedy.

fect."). Accordingly, in the circumstances of this case, vacating McKeever's plea agreement was not the only legally permissible remedy.[10]

IV.

We hold that the District Court did not err in granting McKeever's writ of *habeas corpus* and leaving the remedy to the Commonwealth.[11] The Order of the District Court will be affirmed.

ROTH, Circuit Judge, Dissenting:

I respectfully dissent. I believe that the plea agreement here, negotiated and entered into on the basis of a shared misapprehension as to the reach of one of the statutes under which the defendant is charged, is voidable as based on a material mutual mistake.

I. Facts

Because one aspect of the procedural history in this case is important to this dissent and is not sufficiently set out in the majority's recitation of the facts, I briefly summarize it here. The District Court found that McKeever's conviction of the two PACOA counts violated McKeever's due process rights because PACOA, as later interpreted by the Supreme Court of Pennsylvania, did not reach

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[10] There may be a case in which events subsequent to a multicount plea render the defendant innocent of a count which is so central to the bargain between the parties that vacating the plea is the only constitutionally permitted remedy. This is not such a case.

[11] We are not determining the validity of the Commonwealth's resentencing on remand. Rather, this ruling is limited to the validity of the District Court's order remanding the case to state court for a determination of the appropriate remedy.

wholly illegal organizations such as the one in which McKeever participated. The District Court then issued a writ of habeas corpus but stayed the writ for 180 days "to permit the Commonwealth to vacate the Petitioner's convictions related to the Pennsylvania Corrupt Organizations Statute and resentence him accordingly." Order Adopting the Magistrate Judge's Report and Recommendation, *McKeever v. SCI Graterford*, No. 04-3567, 2005 U.S. Dist. LEXIS 5240 (E.D. Pa. Mar. 23, 2005).[12]

Subsequently, the state courts took several actions on McKeever's case. First, on April 26, 2005, the Erie County Court of Common Pleas denied as untimely McKeever's motion to withdraw his guilty plea. The court then vacated the PACOA convictions and resentenced McKeever to the same aggregate sentence as before. *Com. v. McKeever*, No. 2934 of 1994, slip. op. at 8 (Erie Ct. of Common Pleas June 29, 2005). In its later-filed opinion, the court reasoned that the motion was untimely; the plea was knowing, intelligent, and voluntary; and "if the federal court had intended for this [Court of

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[12] This order identified as the remedy for the constitutional violation the vacatur of the two PACOA convictions and resentencing. This language is inconsistent with portions of the District Court's opinion, which suggest that the District Court would leave the choice of remedy—either vacatur of the PACOA convictions or rescission of the plea—to the Pennsylvania state courts since they were "in a better position to decide whether a 'mutual mistake' denied Petitioner of [sic] the 'benefit' of his 'bargain' with the prosecution, and the legal significance, if any, of such a denial." *McKeever v. Graterford*, No. 04-3567, 2005 WL 696893, at *4 (E.D. Pa. Mar. 23, 2005). We note that in its discussion about permitting the state court to choose the applicable remedy, the District Court cited cases where the basis for habeas relief was breach of the plea agreement, not a plea to activities which did not constitute a criminal offense. In such a situation, there may be more than one constitutionally sufficient remedy. *See Santobello v. New York*, 404 U.S. 257, 263 (1971); *Dunn v. Colleran*, 247 F.3d 450 (3d Cir. 2001).

Common Pleas] to permit Defendant to withdraw his guilty plea, that court would have so indicated in its Order." *Id.* at 3, 18. In January, 2006, the Superior Court affirmed, holding that the motion to withdraw the guilty plea "relate[d], directly and exclusively, to Appellant's PACOA convictions" and was therefore moot.[13] *Commonwealth v. McKeever*, 895 A.2d 649 (Table), No. 880 WDA 2005, slip op. at 3 (Pa. Super. Ct. Jan. 27, 2006).

II. The Sufficiency of the Remedy

The majority concluded that the District Court "was correct in granting McKeever's writ of *habeas corpus* but leaving the precise remedy in the hands of the Commonwealth." I do not agree that offering the state court the choice of fashioning a remedy is the proper solution because I find only one remedy—that of release unless McKeever is allowed to withdraw the entire plea agreement—is constitutionally sufficient.

Moreover, in its Order, the District Court—as the Court of Common Pleas observed—did not present the state courts with a choice of several sufficient constitutional remedies that would avoid McKeever's release. Rather, the Order suspended the granting of the writ on the condition that the state courts implement one specific remedy—vacatur of the PACOA counts. Contrary to the majority's view, I believe that a district court has the authority to issue a conditional writ as long as the condition offered embodies a remedy sufficient to cure the constitutional error. Only where more than one remedy is sufficient to cure that error, should the state court be permitted to choose the remedy.

The precedent invoked by the majority is not to the contrary. The majority cites *Barry v. Brower* for the proposition that "[a] habeas court does not have the

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[13] McKeever had moved for other forms of relief; none of the other motions was granted or is relevant here.

power to directly intervene in the process of the tribunal which has incorrectly subjected the petitioner to the custody of the respondent official." 864 F.2d 294, 301 (3d Cir. 1988) (internal citation omitted). But *Barry* unremarkably stands for the proposition that a federal court's power is limited to ordering a prisoner released *unless* the state court takes certain actions and does not extend to directing the state to do anything. *Barry*, however, does not hold that a federal court is without power to say *which* actions will be sufficient to correct a constitutional infirmity and avoid the prisoner's release. Indeed, in *Barry* we held that the District Court did not have the power to direct the state to reinstate a prisoner's appeal but should instead have issued a conditional writ ordering him released unless the state court, within a certain time period, "enter[ed] an order reinstating [the prisoner's] appeal and permitting the public defender to represent him in that appeal." *Id.* at 301. Similarly, in *Henderson v. Frank*, 155 F.3d 159 (3d Cir. 1998), we specified that "conditional writs must be tailored to ensure that all constitutional defects will be cured by the satisfaction of that condition." *Id.* at 168.[14]

Thus, the District Court was entirely within its authority in issuing a conditional writ of habeas corpus specifying that McKeever should be released unless the state courts adopted a specific remedy to correct the constitutional infirmity. Its error was not in naming a remedy, but in naming the wrong one because the remedy it

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[14] As mentioned above, where more than one remedy would be adequate to correct the conditional defect, it is appropriate for the federal court to offer the state a choice between releasing the petitioner and adopting one of the several remedies identified as sufficient. *See Dunn*, 247 F.3d 450 (where a plea agreement was breached by the prosecution, breach could be remedied either by ordering specific performance of the agreement or by voiding it); *Dickerson v. Vaughn*, 90 F.3d 87, 92 (3d Cir. 1996).

identified was not sufficient. The court should have ordered McKeever released unless he was allowed to rescind the entire plea agreement.

III. Effect of Mutual Mistake on a Guilty Plea

This is not the first time that federal courts have been confronted with the question presented in this case—the effect on a guilty plea of a shared misapprehension as to the reach of a criminal statute. Rather, both the Supreme Court and several sister circuits faced this issue following the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995), which significantly narrowed the reach of the provision prohibiting the use of firearms in relation to the commission of a drug crime, 18 U.S.C. § 924(c). These decisions put forward two principles: first, where the parties involved are mistaken in the shared belief that a certain conduct is reached by a statute, the guilty plea to the counts arising under the specific statute is constitutionally invalid because the plea could not have been knowing or intelligent; and second, because a plea agreement comes about as a "package," a misapprehension shared by the defendant, his counsel, the prosecutor, and the trial court as to the reach of the statute constitutes a mutual mistake with material effects on the bargain, so that the entire plea agreement becomes voidable at the petitioner's request and the parties are returned to their pre-plea positions.[15]

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[15] The majority takes the somewhat puzzling position that nobody was, in fact, mistaken at McKeever's plea because at that time "PACOA did * * * cover McKeever's conduct. * * * The law did not change until after McKeever pled and was sentenced." But the Pennsylvania supreme Court's announcement of the correct interpretation of the PACOA statute is not a "change" in the law—it is simply what the law always was, except that it had been misunderstood. *See Kendrick v. District Attorney*, 916 A.2d 529, 538 (Pa. 2007) ("this Court's interpretation of the term 'enterprise' [as used in the PACOA] was not a 'new rule,' but must be deemed to have merely explicated the meaning

In *Bousley v. United States*, 523 U.S. 614 (1998), the Supreme Court held that, if a plea is to counts arising under a statute later found not to reach the defendant's conduct, that plea is constitutionally invalid. In *Bousley*, the petitioner challenged his plea of guilty to "using" a firearm in violation of 18 U.S.C. § 924(c)(1). The petitioner argued that because the District Court failed to inform him at the time of his plea that the statute required "active employment of the firearm" (as the Supreme Court later clarified in *Bailey*), his plea was not knowing or intelligent. *Id.* at 616 (internal quotation marks and citation omitted). The Supreme Court did not reach the merits of Bousley's claim (rather, it remanded for clarification of whether Bousley could factually make out a claim of "actual innocence" to excuse procedural default), but it stated in strongly worded *dictum* that where a record "reveals that neither [the petitioner], nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged[, the] petitioner's plea [is] constitutionally invalid." *Id.* at 618-19.

Although the petitioner in *Bousley* had pled guilty to multiple counts (as McKeever did in this case), he, unlike McKeever, did not challenge the entire plea on the basis of the shared misapprehension; rather he attacked only the validity of the specific plea to the Section 924(c) violation. Thus the issue of the potential invalidity of the entire plea agreement was not brought to the attention of the Court. Two sister circuits, however, have been con-

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and scope of the term from the Pa.C.O.A.'s original enactment in 1973"); *see also Rivers v. Roadway Express*, 511 U.S. 298, 312-13 (1994) ("judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."). The fact that the interpretation pursuant to which McKeever entered his plea was generally shared in the legal community does not make it any less of a mistake.

fronted with this question and have held that, when the plea as to one violation is constitutionally invalid because the parties did not understand at the time that the statute did not reach the defendant's conduct, the entire plea agreement must be voided; courts should not simply "sever" the invalid pleas and treat the remainder of the plea agreement as valid.

In *United States v. Lewis*, 138 F.3d 840 (10th Cir. 1998), the petitioner had been charged with eleven counts of offenses involving drugs and firearms but, under a plea agreement, had pled guilty to just one of the counts, use of a firearm in relation to a drug trafficking offense under 18 U.S.C. § 924(c). After the Supreme Court decided *Bailey*, Lewis attacked his conviction and sentence, arguing that he was unconstitutionally imprisoned because the statute under which he was convicted and sentenced did not reach his conduct. Lewis, however, did not request that the entire plea be voided (as that would leave him potentially vulnerable to prosecution on the other ten counts); rather, he requested immediate release, since he was imprisoned on the Section 924(c) count only. The Tenth Circuit held that, where a plea agreement is based on a mutual mistake as to the elements of a charge, the only appropriate remedy is to void the entire plea agreement, because a plea agreement is a "package" deal that a district court has the authority to "vacate * * * when a conviction that is part of the plea package is vacated." *Id.* at 842. Because the petitioner was "the party affected by the parties' mutual mistake[, h]is plea agreement with the government [was] voidable, if he so [chose]." *Id.* at 841. The court expressly declined to hold that the plea agreement was invalid only as to one part (Lewis's guilty plea to the 924(c) count) and not another (the dismissal of the other counts); if Lewis chose to pursue his habeas pe-

tition, the entire deal would be off and he could face prosecution on all the originally dismissed counts.[16]

In support of its reasoning, the *Lewis* court quoted approvingly the Ninth Circuit's opinion in *United States v. Barron*, 127 F.3d 890 (9th Cir. 1997):

> Given the realities of plea bargaining, it makes good sense to apply the sentence package concept when a petitioner challenges one of multiple convictions obtained under a plea agreement * * *. Because the district court cannot possibly know what convictions or sentences [a defendant] would have received had he not pleaded guilty to the section 924(c) count * * *, an appropriate remedy is to put [the defendant] in the position he was in before he entered into the plea agreement or before the district court accepted the plea based on conduct which did not constitute the crime charged.

Lewis, 138 F.3d 840, 843, quoting *Barron*, 127 F.3d at 895.[17] *See also United States v. Sandoval-Lopez*, 122 F.3d

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[16] The majority argues that *Lewis* is irrelevant to our purposes because the plea covered only one count and therefore "the constitutionality of vacating one count in a multi-plea agreement was simply not before the court." But the point in *Lewis* is that when there is a plea bargain, the court must look to the entire agreement and not simply to the end result. Thus the *Lewis* court recognized that the defendant's plea to one count was inextricably tied to the dismissal of the other counts, because that dismissal was implicitly part of the bargain.

[17] *Barron* held under similar circumstances that, although the habeas petition had simply requested resentencing once the prosecution had conceded that his conviction under Section 924(c) was invalid, the petition must be understood as an attack on the plea itself and the correct remedy was to set aside the entire plea. This decision was later vacated, however, and on rehearing en banc the Ninth Circuit held that since the petitioner had challenged his incarceration on one ground out of several allowed by Section 2255, the District Court was bound

by the statutory language allowing four possible remedies ("discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate"); it could not "eliminat[e] the two possibilities of resentencing or of correcting the sentence." *United States v. Barron*, 172 F.3d 1153, 1157 (9th Cir. 1999) (en banc). Thus the district court had erred in reasoning that "the only way Barron's motion could be granted was by construing it as an attack on the plea agreement" and granting the motion on condition that Barron agree to withdraw the plea. *Id.* The majority argues that the *Barron* en banc decision is "squarely on point" and invalidates the panel's reasoning (and *Lewis*, which relied on it). It is true that the Ninth Circuit, in its en banc decision, expressed doubts about the applicability of contract law to plea agreements, but these doubts are not the basis of its decision. Rather, the Ninth Circuit was primarily concerned with the propriety of the District Court's *sua sponte* modification of the petitioner's request for vacatur of a single conviction into a motion attacking the plea agreement. *See Barron*, 172 F.3d at 1158 ("It is only the analysis of the district court that turned this simple motion into something more, a challenge to the plea agreement. The district court had no authority to invent a new basis for Barron's motion and erred in doing so.") Indeed, the *Barron* en banc opinion explicitly *recognized* that "the argument that plea bargains must be treated as a package logically applies only in cases in which a petitioner challenges the entire plea as unknowing and involuntary," which is the case for McKeever but not for Barron. *Id.* at 1160. In doing so, Barron cited *United States v. Sandoval-Lopez*, 122 F.3d 797 (3d Cir. 1997), which again makes the same point: "Defendants sometimes bring collateral attacks on the plea agreements qua plea agreements, but claiming that their pleas were not 'knowing' or 'voluntary,' or were otherwise defective. Such attacks are directed at the entire agreement *and, if successful, may render the entire agreement void or voidable.*" *Id.* at 802 (emphasis added). The reasoning in the *Barron* en banc decision thus does not directly affect the conclusion that, if a prisoner attacks the validity of a plea on the grounds of mutual mistake, the proper remedy is to void the plea; it merely stands for the proposition that under Section 2255, a prisoner may attack his imprisonment on a variety of grounds and the district court has discretion to fashion

797, 802 (9th Cir. 1997) (noting in *dictum* that where a defendant attacks a plea agreement, the attack is "directed at the entire agreement, and, if successful, may render the entire agreement void or voidable," so that the "proper remedy" in such a case might be "to vacate or allow withdrawal of the guilty pleas and reinstate" the charges dismissed under the plea agreement); *United States v. Bunner*, 134 F.3d 1000, 1005 (10th Cir. 1998) (where defendant, relying on *Bailey*, had successfully attacked his conviction under Section 924(c), the underlying purpose of the plea agreement was frustrated, and the government's plea agreement obligations became dischargeable; thus, at the government's election, the parties could be returned to position they occupied before Bunner entered his guilty plea).

The Seventh Circuit Court of Appeals recently reached the same conclusion in *United States v. Bradley*, 381 F.3d 641 (7th Cir. 2004). *Bradley* also involved a mutual mistake as to the reach of 18 U.S.C. § 924(c), although in this case it was independent of the Supreme Court's holding in *Bailey*. On direct appeal, the court held that Bradley should be allowed to withdraw his entire plea, not just the plea to the Section 924(c) count. It reasoned, first, that the specific plea to Section 924(c) was not knowing and voluntary, and second, that because there was no "meeting of the minds on all [the] essential terms" of the plea agreement, the *entire* plea agreement, and not just the plea as to Section 924(c), was "tainted." *Id.* at 647-48.

The Supreme Court's decision in *Brady v. United States*, 397 U.S. 742 (1970), cited by the majority for the proposition that a plea agreement that fails to anticipate a change in the law is not per se unknowing and involuntary, is distinguishable from *Bousley*, *Lewis*, and *Bradley*.

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a remedy according to the statute, but not to transform the petition into something it is not.

Brady had pled guilty to kidnaping (18 U.S.C. § 1201(a)) and had received a sentence of 50 years' imprisonment, later reduced to 30. Nine years later, the Supreme Court held in *United States v. Jackson*, 390 U.S. 570 (1968), that the death penalty provision in Section 1201(a)—mandating the death penalty for defendants convicted under this statute, if the victim was not liberated unharmed and if the jury recommended it, but providing that the judge could not impose the death sentence if the defendant pled guilty—needlessly chilled the exercise of the right not to plead guilty and to go to trial, because the defendant could not be sentenced to death if he pled guilty, but faced a significant likelihood of capital punishment if he went to trial. Relying on *Jackson*, Brady then challenged his guilty plea to kidnaping, claiming among other things that his plea was not intelligent because his counsel had wrongly advised him that the jury had the power to condemn him to death (the power later found unconstitutional in *Jackson*).

The Court rejected Brady's argument, holding there was

> no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a *weaker case* than the defendant had thought or that the *maximum penalty then assumed applicable* has been held inapplicable in subsequent judicial decisions.

Brady, 397 U.S. 742, 757 (emphasis added). This phrasing (substantially repeated three times within two paragraphs of the opinion) clarifies the import of the more general proposition, also used on the same page, that "absent misrepresentation or other impermissible conduct by state agents * * * a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate

that the plea rested on a faulty premise." *Id.* The *Brady* Court was not faced with a situation where the statute simply did not reach the defendant's admitted conduct but the parties did not know this; Brady's lack of knowledge regarded the possible sentence, not the fact that he was actually innocent of the charges against him. If the Court had been faced with a situation where defendants would "falsely condemn themselves" because of an offer of leniency, the Court admitted, a different decision might be required. *Id.* at 758. Unlike Brady, McKeever did, in fact, "falsely condemn himself"—not because of an offer of leniency, but because nobody knew any better. McKeever's plea was unknowing in a far more basic sense than Brady's could have been.[18]

Our sister circuits' decisions in *Lewis* and *Bradley*, concluding that a plea agreement such as the one here is voidable in its entirety, are based on the widely agreed-upon notion that plea agreements must be construed according to the general principles of contract law. *See United States v. Gebbie*, 294 F.3d 540, 551 (3d Cir. 2002) (rules of contract interpretation are applied to plea

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[18] In the wake of *Brady*, the Supreme Court held a variety of other misapprehensions insufficiently important to invalidate a guilty pleas. *see United States v. Ruiz*, 536 U.S. 622, 630-31 (2002), but none of these cases involved something as central as the element of the crime. *United States v. Bownes*, 405 F.3d 634 (7th Cir. 2005), cited by the majority, is also not controlling, since it merely held that a broadly worded waiver of appeal in the defendant's plea agreement was effective even if the parties to the agreement had failed to anticipate the Supreme Court's decision in *Booker*, which might have provided the defendant with grounds for appeal. *Id.* at 636. The court in *Bownes* explicitly referred to the "absence of an explicit escape clause" as indicative of the parties' intention not to allow for any flexibility in the waiver. A misapprehension about the defendant's right to appeal his sentence is not of the same order as a misapprehension about whether he can be guilty of a charge.

agreements); *Dunn*, 247 F.3d at 462 (if the government breaches a plea agreement, the remedy is either specific performance or rescission of the agreement and withdrawal of the entire plea); *Houmis v. United States*, 558 F.2d 182, 183 (3d Cir. 1977) (plea was invalid where the record revealed substantial confusion as to whether habeas petitioner "had understood the agreement, and thus [left] doubt as to whether any 'meeting of the minds' ever resulted from plea negotiations"). Under general principles of contract law, a contract based on a material mistake shared by the parties to the contract is voidable. *See Restatement (Second) of Contracts* § 152 ("[w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake").

Of course, not all mistakes can lead to the voiding of a contract. The party wishing to void the contract "must show that the resulting imbalance in the agreed exchange is so severe that he can not fairly be required to carry it out. Ordinarily he will be able to do this by showing that the exchange is not only less desirable to him but is also more advantageous to the other party." *Restatement (Second) of Contracts*, § 152 cmt. c. The majority holds that the mutual misapprehension as to the reach of the PACOA was not a mistake of the kind that would require rescission of the plea agreement because, first, it is a mistake of law rather than fact, and second, it is not material because "the heart of the plea agreement was not the PACOA charges, but rather the drug trafficking charges" and the primary purpose of the plea agreement could be preserved by reforming the contract to conform to the actual state of the law (i.e., by severing the pleas to the PACOA counts). I disagree.

First, whether the misapprehension as to McKeever's innocence is characterized as a mistake of fact or law does

not change its impact on the deal McKeever struck with the Commonwealth. As several commentators have noted, modern contract law has abandoned the strict view that "ignorance of the law is no excuse" and therefore mutual mistakes of law do not affect the validity of contracts even in situations that would give rise to inequity.[19] *See Restatement (Second) of Contracts* § 151 (defining "mistake" as "a belief that is not in accord with the facts") and cmt. b ("[t]he rules stated in this Chapter do not draw the distinction that is sometimes made between 'fact' and 'law.' They treat the law in existence at the time of the making of the contract as part of the total state of facts at that time"); 27 Richard A. Lord, *Williston on Contracts* § 70:125 (4th ed. 1990) (noting that in modern contract law, "[c]ourts generally disallow any distinction between mistakes of fact and law, treating both alike for purposes of equitable relief. * * * To justify rescission, a mistake of law must have related to a question, the answer to which was assumed as part of the fundamental basis of the transaction."); 7-28 Joseph Perillo, *Corbin on Contracts* § 28.49 (revised ed. 2002) ("[t]oday, the rule denying relief for mistake of law has little vitality. It has been eroded by so many qualifications and exceptions, varying from jurisdiction to jurisdiction. It is common to find cases where the issue is not even raised."); E. Allan Farnsworth, *Contracts* § 9.2 ("the modern view is that the existing law is part of the state of the facts at the time of agreement. Therefore, most courts will grant relief for such a mistake, as they would for any other mistake of fact.").

Moreover, whatever value this distinction may have in an ordinary commercial context, it is important to remember that plea agreements are "constitutional con-

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[19] It goes without saying that it would not be practical to insist on "knowledge" of the law in a case like this, since the proper interpretation of the statute had not yet been declared.

tracts" and unlike contracts in other spheres must "be construed in light of the rights and obligations created by the Constitution." *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987). A mistake of law in this context has a constitutional dimension and cannot be treated as tainting the validity of the bargain made by the parties any less than a mistake of fact.[20]

Second, to say that the plea to the two PACOA counts did not affect the sentence finally imposed and that therefore the PACOA counts could not constitute the heart of the plea agreement, is to beg the question. McKeever obtained from the prosecution a treatment for the two PACOA counts that amounted to no additional jail time *in exchange* for his pleas to the drug trafficking counts. That the drug trafficking counts constituted the heart of the *sentence* McKeever received does not necessarily mean that they also constituted the heart of the *bargain*. The mutual mistake as to the reach of the PACOA caused McKeever to accept something valueless (the merger and concurrent sentence on the PACOA counts) in partial exchange for something valuable (his agreement not to contest the other counts). The two PACOA counts represented a potential additional prison term of fourteen years; the mistake as to whether his conduct was criminal under the PACOA could not have been immaterial.[21]

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[20] In deciding *Lewis* and *Bradley*, our sister circuits declined to define the mistake as one of law or of fact, but it is clear that they understood it as one of law or, at most, a mixed one. *See Bradley*, 381 F.3d at 647 (the mistaken was a "misunderstanding of the nature of the charge"); *Lewis*, 138 F.3d at 841 (the parties had a "mutually mistaken belief * * * that the evidence supported the section 924(c) count").

[21] The majority discusses the "sentencing package" doctrine to reach the conclusion that because McKeever was sentenced separately on the drug counts and the PACOA counts there is no need to resentence him upon a finding that he entered a plea on the basis of a mistake as to whether he could be guilty of the

Where a mistake regards a basic assumption on which the bargain is based, rescission of the contract is the preferred remedy; reformation is appropriate only when the mistake "is one as to expression." *United States v. Williams*, 198 F.3d 988, 994 (7th Cir. 1999) (quoting Restatement (Second) of Contracts § 155 cmt. a).[22] *See also United States v. Sandles*, 80 F.3d 1145, 1148 (7th Cir. 1996) ("[w]here there is a mutual misunderstanding as to the material terms of a [plea agreement], the appropriate remedy is rescission, not unilateral modification."); 27 *Williston on Contracts* § 70.35 (4th ed.) ("reformation must yield to rescission where the error is in the substance of the bargain, not in its expression"). *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 219 (3d Cir. 2003), cited by the majority, is not controlling because first, it involved the reformation of a contract containing a provision that was contrary to public policy, not a contract grounded on a mistake of law; and second, the excised provision regarded a matter peripheral to the essence of the bargain (the allocation of attorney fees in a binding

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PACOA counts. This argument, however, misapprehends my position, which is not that the *sentence* was a package, but that the *plea agreement* was. A contract is no less a unified document because a party is charged separately for each item bought.

[22] In *Williams*, the defendant and the prosecutor both erroneously believed he faced a maximum sentence of ten years, rather than the fifteen he was, in fact, exposed to. When this was discovered, the District Court offered Williams the opportunity to withdraw his guilty pleas, but Williams felt this would not benefit him in any way: since he had already cooperated with the government, he would have no bargaining power to negotiate a new deal. On appeal, Williams argued the court should reform the plea agreement to conform to the parties' intent by forcing the government to drop two counts. The Court of Appeals affirmed the District Court's decision to offer Williams the opportunity to rescind the contract in its entirety, holding this was the only possible remedy.

arbitration agreement). Where the parties have reached an agreement only part of which cannot be enforced, despite the parties' intent, because of the external constraints of public policy, it makes sense to allow the core of the contract to survive and invalidate only the sections that offend public policy. But where, as here, the parties are mistaken as to the nature of the bargain, the agreement should be set aside and the parties given the opportunity to renegotiate on the basis of the true value of the bargained-for promises—particularly where mistake as to the nature of the bargain is of constitutional significance; *i.e.*, if the activity covered by the plea is not a criminal offense, can the plea be a knowing and intelligent one.

IV. Prejudice to the Commonwealth

I am mindful of the Commonwealth's argument that, if the plea were voided and McKeever chose to go to trial, the prosecution, through no fault of its own, would be significantly prejudiced by having to locate witnesses to drug transactions that were completed thirteen or fourteen years ago, even though McKeever has never contested his responsibility for them. However, even though a party's delay in declaring his intention to rescind a contract may preclude rescission in an ordinary contract case, the delay has less significance when the reason for rescission has constitutional implications.

Admittedly, McKeever did not act swiftly to put the Commonwealth on notice of his intention to rescind the plea when he learned of the mutual mistake. The initial decision of the Pennsylvania Supreme Court, holding the PACOA inapplicable to wholly illegitimate enterprises, was issued in 1996. *See Commonwealth v. Besch*, 544 Pa. 1, 674 A.2d 655 (Pa. 1996). Even assuming that McKeever did not begin collateral review proceedings at that time because the Pennsylvania legislature promptly amended the statute so that it would clearly apply to illegitimate enterprises, he must have known at the latest by 1999 (when the Pennsylvania Supreme Court issued

Commonwealth v. Shaffer, 557 Pa. 453, 734 A.2d 840 (Pa. 1999)) that the amended statute did not apply retroactively to him.[23] Yet, McKeever waited almost four years—until June 2003—to seek collateral review of his conviction.

In general, a delay of this kind would weaken a party's right to rescission of the contract as an equitable remedy. *See Grymes v. Sanders*, 93 U.S. 55, 62 (1876) (holding, in the context of unilateral mistake, that the party desiring rescission "must, upon the discovery of the facts, at once announce his purpose, and adhere to it"). This conclusion would be strengthened by the prejudice inflicted on the Commonwealth by each intervening year. *See id.* at 62 ("A court of equity is always reluctant to rescind, unless the parties can be put back in status quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it").

In the context of constitutional violations, however, both the Supreme Court and this Court have declined the invitation to consider the prejudice to the prosecution of having to try—or retry—a defendant on the basis of stale evidence. In *Vasquez v. Hillery*, 474 U.S. 254 (1986), the Supreme Court upheld the grant of a new trial to a black petitioner who had been indicted by a grand jury from which blacks were systematically excluded. In dissent,

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[23] McKeever concedes as much when he asserts that he "relied on Shaffer" when he sought collateral review.

It could be argued that McKeever did not act dilatorily, but rather prematurely, since the Pennsulvania Supreme Court has only recently held that *Besch* applies retroactively to cases on collateral review. *See Kendrick v. District Attorney*, 916 A.2d 529 (Pa. Feb. 20, 2007). Unlike McKeever, however, Kendrick sought collateral review of his conviction on *Besch* grounds by amending his PCRA petition immediately after *Besch* was decided, and timely pursued federal remedies after exhausting the state PCRA process. *Id.* at *1-2.

Justice Powell argued relief was inappropriate where the violation occurred in the distant past (twenty-six years, in that case) and where the State could show it would be substantially prejudiced in its ability to retry the defendant. *Id.* at 279-82 (Powell, J., dissenting). The majority, however, rejected the dissent's "theory * * *, which would condition the grant of relief upon the passage of time between a conviction and the filing of a petition for habeas corpus, depending upon the ability of a State to obtain a second conviction." *Id.* at 264.[24] *See also United States v. Nahodil*, 36 F.3d 323, 327-28, 330 (3d Cir. 1994) (noting, in Section 2255 context, that although "prejudice to the government's ability to retry the case" is a factor to be considered in ruling on a motion to withdraw a plea under Fed. R. Crim. P. 11(d)(2)(B), "prejudice to the government's ability to bring a case to trial is not dispositive of a motion to withdraw the guilty plea if the original acceptance of the plea was improper or improvident").[25]

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[24] The majority in *Vasquez* justified its position, among other things, on the absence of a statute of limitations for Section 2254 petitions and on Congress' unwillingness to amend the wording of 28 U.S.C. § 2254 Rule 9(a) (repealed 2004), which provided a defense to the State where it was "prejudiced in its ability to respond to the petition by delay in its filing," but not where the prejudice concerned its ability to bring the petitioner to justice. These considerations have less weight since the adoption of the AEDPA statute of limitations and the repeal of Rule 9(a). However, to allow McKeever to escape the AEDPA statute of limitations on the grounds of "actual innocence" and then deny him the appropriate relief because of his delay in filing his petition would amount to reviving a stricter version of Rule 9(a) by judicial action. I do not believe this would be appropriate.

[25] We are not faced here with a situation where the plea agreement contained an explicit waiver on the part of the defendant of his right to challenge the entire plea if one or more of the statutes under which he was charged are subsequently interpreted not to reach his conduct. I therefore express no

Therefore, I conclude that the District Court should have granted the writ and ordered McKeever released unless his entire plea was rescinded. I respectfully dissent from the majority's holding that vacating the PACOA convictions and resentencing was a sufficient remedy.

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view as to whether this might be an effective way to ensure that prosecutors acting in good faith avoid the problems that arose here and that defendants receive the benefits of their bargain.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MCKEEVER,	:	CIVIL ACTION
	:	
Petitioner,	:	
	:	
v.	:	NO. 04-3567
	:	
WARDEN SCI GRATERFORD et al.,	:	
	:	
Respondent.	:	

Diamond, J. **March 23, 2005**

MEMORANDUM

Victor McKeever petitions for a writ of habeas corpus, seeking to vacate his Pennsylvania State Court guilty plea and sentence. 28 U.S.C. § 2254. Magistrate Judge Jacob Hart has recommended that I grant the writ, and the Pennsylvania Attorney General does not object to the recommendation. Rather, McKeever objects, arguing that the relief recommended by Judge Hart is insufficient. I overrule Petitioner's objections.

FACTUAL AND PROCEDURAL HISTORY

On January 9, 1995, pursuant to the recommendation of a statewide investigating grand jury, the Attorney General filed an 11-count information against Petitioner, charging him with delivery and possession of a controlled substance, dealing in proceeds of unlawful activities, and criminal conspiracy. 18 Pa. C.S. §§ 5111, 903; 35 P.S. § 780-113(a), 116, and 130. In addition, the prosecution charged Petitioner under the Pennsylvania Corrupt Or-

ganizations Act ("PACOA") with corrupt organization and corrupt organization conspiracy. 18 Pa. C.S. § 911(b)(3) and (b)(4). The prosecution alleged that Petitioner possessed and sold substantial amounts of heroin in Allegheny and Erie Counties. On June 13, 1995, Petitioner pled guilty to the information. Pursuant to a plea agreement, the prosecution had "no objection" to the merger of the sentences on Counts II and III (corrupt organization and corrupt organization conspiracy under PACOA), and the imposition of concurrent sentences on Counts I, II, III, and IV (dealing in proceeds of unlawful activities, corrupt organization, corrupt organization conspiracy, and criminal conspiracy). The prosecutor's position was not binding on the Court. During the guilty plea colloquy, the Erie County Common Pleas Court informed Petitioner that he was facing a maximum possible sentence of 145 years imprisonment, which included a possible 20 year sentence for violations of PACOA. (Transcript of Guilty Plea at 6); 18 Pa. C.S. §§ 911(b)(3) and (b)(4).

On July 24, 1995, the state court judge, accepting the recommendation in the plea agreement, imposed an aggregate sentence of 15-42 years imprisonment. Although Petitioner timely appealed his sentence to the Pennsylvania Superior Court, his counsel withdrew that appeal, which the Superior Court dismissed on October 2, 1995. (Memorandum in Support of Petition for Habeas Corpus at 9).

On January 23, 2003, Petitioner sought relief in the Erie County Common Pleas Court under Pennsylvania's Post Conviction Relief Act. 42 Pa. C.S.A. §§ 9451-9551. Petitioner alleged that his guilty plea was based on a mutual mistake of fact, and requested rescission of the plea agreement. On May 6, 2003, the court ruled the PCRA petition untimely, and dismissed for lack of jurisdiction. On February 20, 2004, the Pennsylvania Superior Court upheld the denial of PCRA relief. Commonwealth v.

McKeever, No. 1-51 WDA 2003 (non-precedential opinion).

McKeever filed the instant habeas petition on July 28, 2004. He contends that under changing Pennsylvania statutory and decisional law, he was actually innocent of violating PACOA at the time of his plea. It is undisputed that Petitioner's drug selling business—his "corrupt organization"—was wholly illegitimate. (N.T. 2/23/05 at 15). At the time of his 1995 guilty plea, Pennsylvania law provided that operating a wholly illegitimate business violated PACOA. 18 Pa. C.S. §§ 911(b)(3) and (b)(4); see also Commonwealth v. Besch, 544 Pa. 1, 674 A.2d 655 (Pa. 1996).

In 1996, the Pennsylvania Supreme Court changed the law, holding that PACOA did not apply to individuals, like Petitioner, who operated a wholly illegitimate business. The Supreme Court explained that PACOA was intended to punish those who ran businesses that included both legitimate and illegitimate operations—that is, individuals who "corrupted" legitimate businesses. Besch, 674 A.2d at 661. In 1996, the Pennsylvania Legislature amended PACOA to apply to businesses with solely illegitimate operations. 18 Pa. C.S. § 911 et seq. The Pennsylvania Supreme Court has held that the amendment's application is entirely prospective. Commonwealth v. Shaffer, 557 Pa. 453, 734 A.2d 840 (Pa. 1999). Accordingly, at the time of his 1995 guilty plea, Petitioner's admitted operation of a wholly illegitimate drug business did not violate PACOA.

Once Petitioner sought relief in this Court, the matter was referred to Judge Hart, who determined that: this Court has jurisdiction to hear the matter; Petitioner has exhausted his state court remedies; the instant petition is not time-barred; and, at the time of Petitioner's 1995 guilty plea, he was actually innocent of violating PACOA. Accordingly, Judge Hart concluded that Petitioner's guilty plea to the PACOA counts violated federal due

process standards. (Magistrate Opinion, 11/30/04, at 6 (citing Fiore v. White, 531 U.S. 225, 228-229, (2001); Stocker v. Warden, SCI Graterford, 2004 WL 603400, at *17 (E.D. Pa. Mar. 24, 2004)). Judge Hart recommended that I grant the writ as to the PACOA convictions, and that I stay execution of the writ for 180 days to permit the Commonwealth of Pennsylvania to vacate the PACOA convictions and resentence Petitioner.

On December 20, 2004, Petitioner objected to Judge Hart's Report and Recommendation, contending that "the appropriate remedy for the federal constitutional violation is rescission of the [1995] plea agreement." (McKeever's Response to Commonwealth's Answer to Objections at 2). In Petitioner's view, I am obligated to

> remand to the sentencing court with instructions that the [entire] guilty plea be vacated on the grounds that it was not entered knowingly, intelligently, and voluntarily with full knowledge of the nature of the charges and the maximum sentence that could have been imposed.

(McKeever's Supplemental Memorandum at 1).

The Attorney General does not object to Judge Hart's conclusion that Petitioner is actually innocent, or to the relief Judge Hart recommends. The prosecution urges, however, that "principles of comity and federalism" do not allow me to rescind Petitioner's guilty plea in its entirety. (Attorney General Supplemental Memorandum at 1).

STANDARD OF REVIEW

The extent of District Court review of a Magistrate Judge's Report is committed to the Court's discretion. See Jozefick v. Shalala, 854 F. Supp. 342, 347 (M.D. Pa. 1994); see also Thomas v. Arn, 474 U.S. 140, 154 (1985); Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984); Heiser v. Ryan, 813 F. Supp. 388, 391 (W.D. Pa. 1993), aff'd, 15 F.3d 299 (3d Cir. 1994). The District Court must review

de novo those portions of the Report to which objection is made. 28 U.S.C. § 636(b)(1)(C) (2004); see generally Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984). The Court may "accept, reject or modify, in whole or in part, the magistrate's findings or recommendations." Brophy v. Halter, 153 F. Supp. 2d 667, 669 (E.D. Pa. 2001).

DISCUSSION

A federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In fashioning a remedy, "both the historic nature of the writ and principles of federalism preclude a federal court's direct interference with a state court's conduct of state litigation." Barry v. Brower, 864 F.2d 294, 300 (3d Cir. 1988) (citing Wainwright v. Sykes, 433 U.S. 72, 81 (1977)). The Third Circuit in Barry has cautioned:

> A habeas court does not have the power to directly intervene in the process of the tribunal which has incorrectly subjected the petitioner to the custody of the respondent official, [and] the respect due the tribunals of a sovereign state within our federal system * * * requires that its courts be given an opportunity to correct their own errors.

Barry, 864 F.2d at 301; Dickerson v. Vaughn, 90 F.3d 87, 92 (3d Cir. 1996) ("a state should be given the opportunity to correct its own errors and federal remedies should be designed to enable state courts to fulfill their constitutional obligations to the defendant") (citation omitted).

Here, Petitioner argues that he has been denied the "benefit" of his "bargain" with the prosecution. Had he known that the PACOA charges were a legal nullity, he would have insisted that the plea agreement include different terms. (McKeever Response to Commonwealth's Answer to Objections at 3). Accordingly, he argues that as a matter of federal constitutional law, I am obligated

to rescind the agreement in its entirety. Whatever the merits of this argument, it is more appropriately made in the state court on remand. See Barry, 864 F.2d at 301; Dickerson, 90 F.3d at 92.

The case of Dunn v. Colleran is instructive. 247 F.3d 450 (3d Cir. 2001). The petitioner Dunn pled nolo contendere to state court assault charges pursuant to a plea agreement in which the prosecutor promised to recommend a minimum sentence within the state guideline range. At sentencing, the prosecutor reneged on the agreement, successfully arguing for a "considerable" penalty and a "lengthy term of incarceration." Id. at 451. On habeas review, the Third Circuit agreed that Dunn's state court conviction was unconstitutionally obtained, but also deemed it appropriate "to refer the issue of remedy to the state court." Id. at 462. The Court refused to decide "whether [Dunn] should be resentenced under the plea agreement or given the opportunity to withdraw his plea." Id. The Court explained that the limited federal review allowed under § 2254 "informs our decision to give the state court an opportunity to determine whether [the Defendant] should be resentenced or permitted to go to trial." Id.

The Supreme Court has held similarly. In Santobello v. New York, a New York prosecutor agreed that in return for Santobello's guilty plea to criminal charges, the prosecutor would make no sentencing recommendation. 404 U.S. 257, 263 (1971). After the state court's acceptance of the guilty plea, a new prosecutor took over the case. At sentencing, the new prosecutor recommended the statutory maximum sentence, which the trial judge imposed. A Supreme Court plurality agreed that the guilty plea was defective, and remanded to the state courts for further consideration. Id. at 262-263. The plurality stated:

> The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement of the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty.

See also Patrick v. Camden County Prosecutor, 630 F.2d 206, 208 (3d Cir. 1980) ("We think Santobello [v. New York] dictates that if there is a violation of a plea bargain, the relief to be afforded is within the discretion of the state court, at least where more than one remedy is legally permissible."); Gunn v. Ignacio, 263 F.3d 965, 971 (9th Cir. 2001) ("On petitions for a writ of habeas corpus, we require * * * that resentencing be available where the plea agreement regarding sentence was breached, but we do not constrain the state's determination of how to formulate the relief."); 28-671 Moore's Federal Practice—Criminal Procedure § 671.12 (2004) ("The federal courts have no power to order the state to provide a specific remedy * * * * If the error affected the validity of the sentencing proceeding, the release will be conditioned on the state resentencing the petitioner.").

This uniform authority compels me to conclude that the Pennsylvania State Courts alone should determine whether Petitioner's plea agreement may stand in the circumstances presented here. The state courts are in a better position to decide whether a "mutual mistake" denied Petitioner of the "benefit" of his "bargain" with the prosecution, and the legal significance (if any) of such a denial. Indeed, at oral argument, Petitioner's counsel suggested as much when she stated that, under Pennsylvania's very strict waiver doctrine, she was obligated to raise on federal habeas review the issue of relief so that it

would be preserved when the case was remanded to state court. (N.T. 2/23/05 at 4). See Commonwealth v. Kemmerer, 526 Pa. 160, 164, n.7 (1991) (criminal defendant is required to raise his constitutional objections in prior proceedings) (citing Commonwealth v. Clair, 458 Pa. 418, 326 A.2d 272 (1974); Commonwealth v. Marlin, 452 Pa. 380, 305 A.2d 14 (1973)).

I adopt Judge Hart's Report and Recommendation and grant the writ of habeas corpus. The execution of the writ is stayed for 180 days from the date of this Order to permit the Commonwealth of Pennsylvania to vacate Petitioner's convictions related to the Pennsylvania Corrupt Organizations statute and to resentence him accordingly. If the Commonwealth fails to vacate the PACOA convictions, the writ shall issue and Respondents shall release McKeever from any incarceration or other restraint imposed by the conviction under attack in this petition. An appropriate Order follows.

By The Court

_____

Paul S. Diamond, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MCKEEVER,	:	CIVIL ACTION
	:	
Petitioner,	:	
	:	
v.	:	NO. 04-3567
	:	
WARDEN SCI GRATERFORD et al.,	:	
	:	
Respondent.	:	

Order

AND NOW, this 28th day of September, 2004 [*sic*], upon consideration of the cross-Motions for Summary Judgment, the Report and Recommendation of Magistrate Judge M. Faith Angell [*sic*], and Plaintiff's Objections to the Report and Recommendation and Defendant's response, it is ORDERED and DECREED:

1. Plaintiff's Objections to the Report and Recommendation are OVERRULED;

2. The Report and Recommendation is APPROVED and ADOPTED;

3. Plaintiff's Motion for Summary Judgment is DENIED; and

4. Defendants' Motion for Summary Judgment is GRANTED.

The Clerk of Court shall close this matter for statistical purposes.

BY THE COURT:

Paul S. Diamond, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2492

VICTOR MCKEEVER,

Appellant

v.

WARDEN SCI-GRATERFORD;
ATTORNEY GENERAL,
COMMONWEALTH OF PENNSYLVANIA;
DISTRICT ATTORNEY, ERIE COUNTY

On Appeal from the Judgment
of the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 04-cv-03567)
District Judge: Honorable Paul S. Diamond

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and ROTH,*
Circuit Judges and IRENAS,* District Judge

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

---

* Limited to panel vote only.

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: 6 June 2007

64

Supreme Court, U.S.
FILED
SEP 04 2007
OFFICE OF THE CLERK

No. (2) 07-324

In the Supreme Court of the United States

VICTOR MCKEEVER, PETITIONER

v.

WARDEN SCI-GRATERFORD, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

Page

APPENDIX D – Magistrate Judge's Report and Recommendation 1sa

APPENDIX

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTOR MCKEEVER,	:	CIVIL ACTION
Petitioner,	:	
v.	:	
DAVID DIGUGLIELMO, et al.,	:	NO. 04-3567
Respondent.	:	

REPORT AND RECOMMENDATION

Jacob P. Hart, M.J.

November 30, 2004

This is a counseled petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, on behalf of an individual currently incarcerated at the State Correctional Institution at Graterford, Pennsylvania. For the reasons that follow, I recommend that the petition be granted.

FACTS AND PROCEDURAL HISTORY:

On June 13, 1995, McKeever pleaded guilty in the Court of Common Pleas of Erie County to violations of Pennsylvania's Corrupt Organizations Act, ("PACOA"), dealing in proceeds of unlawful activity, six counts of delivery of a controlled substance, criminal conspiracy, and possession of a controlled substance.[1] He was

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[1] Ordinarily, this court would have recommended transferring the case to the Western District of Pennsylvania because McKeever was convicted in Erie County, which lies in the Western District. The statute, however, confers concurrent jurisdiction on the district wherein the conviction was obtained and the district wherein the petitioner is confined and allows the court to transfer the petition to the other jurisdiction "in the furtherance of justice." 28 U.S.C. § 2241(d). Since the District Attorney of Erie County is in

sentenced to 15 - 42 years' incarceration by the Honorable Stephanie Domitrovich. McKeever filed a timely appeal in the Superior Court, which his appointed counsel subsequently withdrew. The Superior Court dismissed the appeal on October 2, 1995.

Seven and a half years later, McKeever filed a petition pursuant to Pennsylvania's Post Conviction Relief Act, ("PCRA"), 42 Pa.C.S.A. §§ 9541-9551. The PCRA Court found that the petition was untimely and dismissed the petition for lack of jurisdiction on May 6, 2003. McKeever appealed to the Superior Court, claiming that the PCRA Court erred in dismissing the petition as time-barred because he was actually innocent of the crimes, he was abandoned by his counsel, and the trial court was without jurisdiction to impose the sentence. On February 20, 2004, the Superior Court affirmed the denial of PCRA relief, noting that McKeever failed to plead any of the statutory exceptions to the PCRA's timeliness requirements. Commonwealth v. McKeever, No. 1051 WDA 2003.

On July 28, 2004, McKeever filed this petition for habeas corpus. The bulk of his claims relate to the Pennsylvania Supreme Court's decision in Commonwealth v. Besch, 674 A.2d 655 (Pa. 1996), in which the Court concluded that Pennsylvania's Corrupt Organizations Act did not apply to individuals engaged in a wholly illegitimate enterprise or business. Like Besch, McKeever was engaged in a wholly illegitimate business, selling drugs. Since McKeever's actions did not vio-

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the best position to respond to the petition, we would ordinarily recommend transferring such a petition to the Western District. However, in this case, McKeever's counsel is located in the Eastern District, and the case upon which McKeever most heavily relies is from our District Court. Therefore, we conclude that the interests of justice are best served by consideration of this petition in the Eastern District.

late the Pennsylvania Corrupt Organizations Act, as it was written at the time, he contends that his conviction violates due process and the proscription against cruel and unusual punishment. McKeever also argues that the Court of Common Pleas of Erie County lacked jurisdiction over certain drug transactions that occurred in Allegheny County. Finally, McKeever argues that his direct appellate counsel was ineffective for abandoning him.

DISCUSSION:

Tolling of the Limitations Period

In response to the petition, the Attorney General argues that the petition is time-barred. The Petitioner contends that the habeas limitations period should be equitably tolled because he is innocent of the crime of which he was convicted. For the reasons that follow, we conclude that the limitations period should be tolled in the circumstances presented by McKeever's case. However, as will be explained the tolling applies only to one of McKeever's claims, and on that claim, we recommend that the writ be granted only to the extent that McKeever's conviction relating to the violation of PACOA be vacated and he be resentenced without consideration of the PACOA convictions.

The question for the court is whether actual innocence is an exception to § 2244's one year limitations period. Neither the Supreme Court nor the Third Circuit have addressed this issue. The Honorable James Giles, Chief Judge of our District Court, has found that, in limited circumstances, innocence or manifest injustice does provide a basis to excuse § 2244's limitations period. Stocker v. Warden, SCI Graterford, 2004 WL 603400 (E.D. Pa. Mar. 24, 2004).

In Judge Giles' case, like ours, the petitioner was convicted of violating PACOA prior to the decision in Besch. When presented with Stocker's Besch-based claim, the state courts found that his state filings were untimely.

Without any statutory or equitable tolling, the habeas petition would also be untimely. However, Judge Giles found that, under the circumstances of Stocker's case, the limitations period had to give way to "fundamental notions of justice and fairness." Stocker, at *5.

Throughout Judge Giles' opinion, he stresses that Stocker had no possible opportunity to timely bring his Besch claim. "Stocker was technically time-barred from raising the claim before the highest court rendered its decision that was made applicable to him." Stocker, at *5. Judge Giles pointed out that "constitutional concerns result where a diligent petitioner has *no opportunity* to receive a full and fair hearing on constitutional violations resulting in incarceration." Stocker, at *7.

In responding to McKeever's habeas petition, the Attorney General attempts to distinguish Stocker by focusing on Judge Giles' determination that Stocker had no possible opportunity to bring his Besch claim. In contrast, argues the Attorney General, McKeever could have brought a timely PCRA petition after the Besch decision.

> McKeever is not similarly situated to Stocker. McKeever was not foreclosed from timely asserting his "actual innocence" under *Besch*.... In sum, when *Besch* was announced, McKeever had ample time to file a petition for post conviction relief and raise the application of *Besch* to his conviction and sentence for corrupt organizations.... These circumstances stand in sharp contrast to "Stocker [who] was technically time-barred from raising the claim before the highest court rendered its decision that was made applicable to him." *Stocker*, 2004 WL 603400 *5 (E.D. Pa.) Stocker had no avenue of relief in the state courts by which he could have timely pursued *a Besch* claim. McKeever had an available route of relief which he ignored for a period of seven years.

Response, at 11-12.

We, like Judge Giles, disagree with the Attorney General's argument. At the time Besch was decided, McKeever (and Stocker) had two weeks to file a Besch based claim in the state courts before the Pennsylvania legislature amended PACOA to include illicit businesses. Thereafter, the Pennsylvania Superior Court concluded that the legislature's actions, in essence, overruled Besch Commonwealth v. Shaffer, 696 A.2d 179, 183 (Pa. Super. 1997) revs'd 734 A.2d 840 (Pa. 1999). It was not until the Pennsylvania Supreme Court reviewed the Shaffer decision that the state's highest court addressed the effect the statutory amendment had on the Besch decision. On July 21, 1999, the Pennsylvania Supreme Court made clear, for the first time, that the legislature's amendment applied only prospectively. Shaffer, 734 A.2d at 844. Thus, McKeever's (and Stocker's) Besch claim did not become ripe until July, 1999, when "the highest court rendered its decision that was made applicable to him." Stocker, at *5.

At that point, Stocker filed a PCRA petition, which was found to be untimely by the state courts. Stocker, at *2-*3. McKeever did not file for collateral relief until January of 2003, at which time the state courts found his petition untimely. Despite McKeever's delay in filing for state collateral relief, there is no reason to believe that McKeever was in any different a position than was Stocker. Had he filed a PCRA petition after the Pennsylvania Supreme Court's decision in Shaffer, his petition would also have been found to be untimely filed.[2] Thus, it is clear that

[2] The PCRA was amended on November 17, 1995, to include a one year statute of limitations, effective January 16, 1996. If a petitioner's conviction became final prior to the effective date, he would have one year to file a timely PCRA petition. Because the Pennsylvania courts found that none of the exceptions to the limitations period applied to the facts presented by Stocker, it is clear that any petition McKeever brought after January 16, 1997, would also have been considered untimely.

McKeever is in the same position as Stocker "[T]here was *no possible* opportunity for petitioner to `timely file' for relief following the Pennsylvania Supreme Court's declaration of the statute." Stocker, at *5. Thus, we believe, with respect to the Besch claim, § 2244's limitations period should be equitably tolled.[3]

Exhaustion and Default

As previously discussed, McKeever had no avenue in the state courts through which to present his Besch claim. Thus, the federal court should excuse the exhaustion requirement. See 28 U.S.C. § 2254(b)(1)(B)(i). Similarly, the federal court should excuse McKeever's procedural default.

> [I]f the final state court presented with a federal claim refuses to decide its merits based on an established state rule of law independent of the federal claim and adequate to support the refusal, federal habeas review is foreclosed unless there is cause and prejudice or a showing of innocence.

Sistrunk v. Vaughn, 96 F. 3d 666, 673 (3d Cir. 1996)(citing Coleman v. Thompson, 501 U.S. 722, 750 (1991).

It is clear that the cause for McKeever's default was the strict construction of the PCRA's statute of limitations, despite the fact that the "interpretation definitively recognizing the illegality of petitioner's imprisonment was not issued until 1999," Stocker, at * 14, after McKeever's time for timely filing a PCRA petition had already expired.

It is also clear that McKeever has suffered prejudice. He has been imprisoned for conduct that, at the time, did not violate PACOA. See Shaffer, 734 A.2d at 844. The

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[3] Since McKeever could have presented his other claims on direct appeal or in a timely filed PCRA petition, we find no reason to toll the limitations period with respect to the remaining claims.

Supreme Court has found that such imprisonment violates the Due Process Clause of the Fourteenth Amendment. See Fiore v. White, 531 U. S. 225, 228-29 (2001); Stocker, at *17.

McKeever is entitled to habeas relief on this claim. Although the Attorney General argues that elimination of the PACOA related sentences will not change the aggregate sentence, this is an issue for the state courts to address.

Based on the foregoing discussion, I make the following:

RECOMMENDATION

AND NOW, this 30th day of November 2004, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be GRANTED to the extent the Petitioner's PACOA related convictions be vacated and the Petitioner be resentenced.

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

69

FILED
OCT 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-324

In the Supreme Court of the United States

VICTOR MCKEEVER, PETITIONER

v.

WARDEN SCI-GRATERFORD, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY IN SUPPORT OF CERTIORARI 1

I. The Decision Below Turns Precisely On The Question Presented 2

II. The Distinction Between Federal Habeas Review And Direct Review Makes No Difference Here 5

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

Berkemer v. *McCarty*,
468 U.S. 420 (1984)..... 6

Bousley v. *United States*,
523 U.S. 614 (1998)..... 1, 8

Boykin v. *Alabama*,
395 U.S. 238 (1969)..... 7

Brewer v. *Williams*,
430 U.S. 387 (1977)..... 3

Coleman v. *Thompson*,
501 U.S. 722 (1991)..... 6

Dowd v. *United States ex rel. Cook*,
340 U.S. 206 (1951)..... 4

Fay v. *Noia*,
372 U.S. 391 (1963)..... 6-7

Ford v. *Wainwright*,
477 U.S. 399 (1986)..... 6

Irvin v. *Dowd*,
366 U.S. 717 (1961)..... 4

Nix v. *Williams*,
467 U.S. 431 (1984)..... 6

United States v. *Barron*,
172 F.3d 1153 (9th Cir. 1999)..... 5

United States v. *Bradley*,
381 F.3d 641 (7th Cir. 2004)..... 5, 8

United States v. *Ingram*,
979 F.2d 1179 (7th Cir. 1992)..... 8

United States v. *Lewis*,
138 F.3d 840 (10th Cir. 1998)..... 5

United States v. *Ringling*,
988 F.2d 504 (4th Cir. 1993)..... 8

United States v. *Sandles*,
80 F.3d 1145 (7th Cir. 1996)..... 8

STATUTES

28 U.S.C. § 2243 4

28 U.S.C. § 2254(d)..... 5-6

OTHER AUTHORITIES

Restatement (Second) of Contracts § 152 (1979) 8

17B Charles A. Wright, *et al.*, *Federal Practice & Procedure: Jurisdiction 3d* § 4268.4 (2007)..... 4

REPLY IN SUPPORT OF CERTIORARI

Respondents have made no attempt to defend the decision below on its merits. That is understandable, since respondents cannot dispute the facts that (1) the parties and the trial court were mistaken about the criminality of petitioner's conduct under the Pennsylvania Corrupt Organizations Act ("PACOA"); (2) as a result of this mistake, petitioner pled guilty to two crimes that were not actually crimes; and (3) as a result of this guilty plea, petitioner was exposed to an additional 14 years' imprisonment. In response to the petition, respondents have not even disputed that petitioner's guilty plea was unknowing or involuntary and thus "constitutionally invalid," *Bousley* v. *United States*, 523 U.S. 614, 618 (1998), or that the mutual mistake was *material* to petitioner's decision to enter the plea. If respondents do not dispute these basic facts, why is petitioner still in prison, serving a sentence that was imposed pursuant to an admittedly unconstitutional guilty plea?

Respondents' sole answer to this question, and their sole argument in opposition to *certiorari*, is the truism that habeas review is not direct review. According to respondents, the decision below turns on the principle of comity, not on the scope of petitioner's constitutional rights. And since the decision below is a habeas decision, it cannot possibly conflict with non-habeas decisions.

As we demonstrate below, respondents' argument suffers from two fundamental flaws. *First*, contrary to respondents' assertion, the outcome of this case does, in fact, turn on the resolution of the question presented. That is why the court below spilled so much ink addressing it, and that is why the majority

below characterized its resolution of that issue as the *holding* of the case. *Second*, the distinction between habeas review and direct review simply makes no difference here, because the question presented involves the scope of petitioner's constitutional rights rather than the scope of review of a state court's judgment. If due process requires that a criminal defendant be permitted to rescind a plea agreement that is based on a mutual mistake about the criminality of his conduct, that rule must apply equally on habeas review and on direct review.

I. The Decision Below Turns Precisely On The Question Presented.

Respondents are demonstrably incorrect in their assertion that the decision below "did not rule on the question of when mutual mistake of fact mandates rescission of a guilty plea." Opp. at 8. According to respondents, the decision below instead "turns on application of principles inherent in federal review of a state court conviction and contains no binding authority on rescission of a guilty plea." Opp. at 12. That statement is false, and ignores the plain terms of the decision below.

Contrary to respondents' assertion, the decision below turns precisely on the question presented. Indeed, respondents' attempt to rewrite the decision below is conclusively refuted by the plain terms of the majority opinion: "Because we *hold* that the PACOA charges were not an essential part of the agreed exchange, rescission of the plea is not necessary and the Commonwealth did not err in vacating the two PACOA counts and resentencing McKeever based upon the remainder of the plea agreement." Pet. App. 14a (emphasis added); see also Pet. App. 34a ("I

respectfully dissent from the majority's holding that vacating the PACOA convictions and resentencing was a sufficient remedy").

To arrive at this holding—that rescission is not necessary to remedy the due process violation and that petitioner could be resentenced under a judicially-modified plea agreement—the court below specifically "decline[d] to adopt a rule that renders a multi-count plea agreement *per se* invalid when a subsequent change in the law renders a defendant innocent of some, but not all, of the counts therein" and further "reject[ed] the argument that such a plea could never be entered by a defendant voluntarily and intelligently." Pet. App. 7a-8a. Again, the majority concluded that "vacating McKeever's plea agreement was not the only legally permissible remedy." Pet. App. 15a.

These holdings do not rest on principles of comity or federalism, but rather on the majority's view of the substance of petitioner's due process rights. The majority held that although due process would not permit petitioner's conviction on the PACOA counts, due process would allow resentencing under a judicially-modified plea agreement. See Pet. App. 8a, 14a. Judge Roth disagreed, explaining that rescission of the plea agreement is the *only* cure for the violation of petitioner's due process rights. See Pet. App. 17a.

Had the majority agreed with Judge Roth on this point, the decision below would have been different. Specifically, the court below would have directed the district court to allow the Commonwealth a reasonable time in which to vacate the PACOA convictions, rescind the plea agreement, and either accept a new plea or proceed to trial. See *Brewer* v. *Williams*, 430

U.S. 387, 406 n.13 (1977) (finding a constitutional violation in a habeas proceeding but suspending issuance of the writ for 60 days to allow the State to initiate a new trial consistent with constitutional requirements); *Irvin* v. *Dowd*, 366 U.S. 717, 729 (1961) (directing the habeas court to "allow the State a reasonable time in which to retry petitioner"); *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, 210 (1951) (directing the habeas court to "allow the State a reasonable time in which to afford respondent the full appellate review he would have received but for the suppression of his papers"). It is common practice to grant habeas relief conditionally (as the district court did here), ordering the prisoner's release unless he is "retried [consistent with constitutional requirements] within a reasonable time which may be specified in the order." 17B Charles A. Wright, *et al.*, *Federal Practice & Procedure: Jurisdiction 3d* § 4268.4 (2007) (quoting 28 U.S.C. § 2243). Of course, the condition must actually cure the constitutional violation.[1]

In sum, the plain text of the decision below makes clear that the result in this case turned on the question whether rescission is the only cure for the due process violation that occurred when petitioner was convicted and sentenced pursuant to a plea agreement that resulted from a mutual mistake. Thus, the question presented—which asks this Court to define the scope of a defendant's due process rights where a guilty plea is based upon the parties' mutual mistake

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[1] Respondents' charge that petitioner seeks to have the federal courts "order a state court to fashion a particular remedy" (Opp. at 10) fails to recognize that any grant of conditional habeas relief effectively orders the state court to cure the constitutional violation as an alternative to the prisoner's immediate release. That is all petitioner seeks here.

about the criminality of his conduct—is dispositive of this case and exposes a clear conflict between the decision below and decisions from other federal and state appellate courts. See, *e.g.*, *United States* v. *Bradley*, 381 F.3d 641 (7th Cir. 2004); *United States* v. *Barron*, 172 F.3d 1153 (9th Cir. 1999) (*en banc*); *United States* v. *Lewis*, 138 F.3d 840 (10th Cir. 1998); see Petition at 8-17 (discussing contrary decisions from federal and state courts).

This Court's review is warranted to resolve that conflict and vindicate the rule of *Bousley* that a defendant cannot be convicted and sentenced pursuant to a plea agreement reflecting the parties' mutual mistake about essential elements of the charged offenses.

II. The Distinction Between Federal Habeas Review And Direct Review Makes No Difference Here.

Nor is there any merit to respondent's attempt to invoke the distinction between habeas review and direct review. This distinction makes no difference here, because the question presented—on which federal and state appellate courts are divided—involves the scope of protection under the Due Process Clause, an issue wholly unaffected by the procedural posture of the case.

To be sure, limitations on federal habeas review reflect principles of comity and federalism in several ways. Most significantly, 28 U.S.C. § 2254(d) limits the scope of review of a state court's judgment, making habeas relief available only if the state court's decision is "contrary to" or an "unreasonable application of" clearly established federal law. In addition, due regard for comity and federalism are reflected in the

doctrines relating to independent and adequate state grounds, especially procedural default and exhaustion of state remedies. See *Coleman* v. *Thompson*, 501 U.S. 722, 730-731 (1991); *Fay* v. *Noia*, 372 U.S. 391, 430-431 (1963).

The decision below, however, does not turn on the standard of review under § 2254(d), nor does it implicate the concerns animating *Coleman* and *Fay*. Rather, the decision below turns on a straightforward interpretation of the Due Process Clause in the context of a mutually-mistaken plea agreement. The proper interpretation of the Due Process Clause in this context is not affected by the fact that the question happens to arise in a habeas case rather than on direct review.[2] The Due Process Clause means what it means, and this Court's answer to the question presented will apply equally in federal and state courts, in habeas proceedings and on direct review.

1. Unlike *Coleman*, this case does not involve an independent and adequate state ground or a procedural default—the specific subjects of the Court's discussion of comity. See 501 U.S. at 730-731. Petitioner presented his due process challenge to the

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[2] This Court has granted certiorari in other federal habeas cases to consider similar constitutional claims. For example, in *Nix* v. *Williams*, 467 U.S. 431 (1984), this Court resolved the question whether the Fourth Amendment permits a state court to admit evidence under an "inevitable discovery" exception to the exclusionary rule. In *Berkemer* v. *McCarty*, 468 U.S. 420 (1984), another federal habeas case, this Court considered the question whether the *Miranda* rule applies to misdemeanors. And in *Ford* v. *Wainwright*, 477 U.S. 399 (1986), this Court granted certiorari to decide whether the Eighth Amendment forbids execution of insane prisoners. Thus, there is nothing unusual about defining the scope of constitutional rights in the context of a habeas case.

Pennsylvania courts, but his claims were dismissed as untimely. See Pet. App. 4a-5a. The magistrate judge found, however, that any procedural default was excused because of petitioner's *actual innocence* of the PACOA charges, and respondents did not challenge that finding. See Pet. App. 5a, 37a-38a; Supp. App. 6sa. Because petitioner's actual innocence excused any procedural default, *Coleman*'s concern that the state court be given the first opportunity to identify and correct any constitutional violation is not implicated here.

2. Likewise, *Fay* is no obstacle to granting certiorari in this case. As this Court made clear in *Fay*, a federal habeas court is authorized to (1) determine whether the prisoner has been confined contrary to the Constitution or federal statute and (2) if so, order his release. See 372 U.S. at 430. The habeas court "has no other power" except to "act * * * on the body of the prisoner." *Id.* at 431. It is undisputed that petitioner was confined in violation of due process. Rather than order petitioner's release, however, the district court gave the Commonwealth an opportunity to cure the due process violation itself. If, as Judge Roth explained, rescission is the *only* cure for the due process violation at issue in this case, then the district court should have conditioned its stay of the writ upon the Commonwealth court's entering an order vacating the PACOA convictions and rescinding the plea agreement. See Pet. App. 17a, 34a.

Judge Roth's analysis is correct, and rescission is the only alternative to petitioner's immediate release from confinement. Due process requires that a guilty plea be knowing and intelligent, see *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969), and a plea cannot be knowing or intelligent if it is based upon the parties'

mutual mistake concerning an essential element of the charged offense, see *Bousley*, 523 U.S. at 618-619. Where a criminal defendant enters a guilty plea, waiving certain constitutional rights, based upon a mutual mistake, due process requires that he be afforded *at least* the remedies that are available to private contracting parties in similar circumstances. See *United States* v. *Ringling*, 988 F.2d 504, 506 (4th Cir. 1993); *United States* v. *Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992). Under general principles of contract law, a contract that results from a mutual mistake is voidable at the option of the party aggrieved by the mistake. See *Restatement (Second) of Contracts* § 152 (1979). Accordingly, where a criminal defendant is convicted and sentenced pursuant to a mutually-mistaken plea agreement, in violation of due process, and where the defendant requests rescission of the plea agreement once the mistake is discovered, the judgment of conviction must be vacated and the agreement must be rescinded. See, *e.g.*, *Bradley*, 381 F.3d at 648. Merely resentencing the defendant pursuant to the unconstitutional plea agreement—unilaterally modified to account for vacated convictions—is no cure. See, *e.g.*, *United States* v. *Sandles*, 80 F.3d 1145, 1148 (7th Cir. 1996) ("Where there is a mutual misunderstanding as to the material terms of a contract, the appropriate remedy is rescission, not unilateral modification").

3. Because there is no material distinction between the posture of the decision below and the postures of the other decisions cited in the petition, the conflict created by the decision below is real and significant. The resolution of this conflict will establish a single due process standard applicable in any proceeding raising a similar issue. Accordingly, this case

is an appropriate vehicle for resolution of the question presented, and respondents' opposition to the petition is wholly unfounded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

VICTOR McKEEVER,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where a federal court vacates two counts of a multi-count state conviction by grant of writ of habeas corpus under 28 U.S.C.§2254 and remands to state court for the purpose of fashioning an appropriate remedy, should this Court grant certiorari to consider whether the federal court erred in failing to order the state court to perform the specific remedy of rescission of the guilty plea in its entirety.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ..... iii, iii

COUNTER-STATEMENT OF THE CASE 1

REASONS TO DENY THE WRIT 8

I. The Third Circuit Opinion Is An Inappropriate Vehicle For Consideration of The Question Posed By Petitioner 8

A. The Third Circuit Decision For Which Certiorari Is Sought Did Not Rule On The Question Of When Mutual Mistake of Fact Mandates Rescission Of A Guilty Plea 8

B. Cited Circuit Court Decisions Which Dispose of Claims Of Federal Prisoners On Direct Appeal Are Not In Conflict With The Third Circuit Disposition of The Habeas Petition of State Prisoner McKeever. 13

C. Cited State Court Decisions Are Not In Conflict With the Third Circuit Decision For Which Review Is Sought. 14

D. Regardless of Whether The Question As Framed By the Petitioner Is A Matter of Importance to Both State and Federal Criminal Justice Systems, The Holding Of The Decision For Which Review is Sought Does Not Turn On The Question Posed. 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Coleman v. Thompson, 501 U.S. 722 (1991) 10, 12

Commonwealth v. Besch, 674 A. 2d 655 (Pa. 1996) 2

Commonwealth v. McKeever, No. 1051 WDA 2003, slip op. (February 20, 2004 Pa. Super) 4

Commonwealth v. McKeever, No. 1631 WDA 2007 ... 11

Commonwealth v. McKeever, No. 880 WDA 2005, slip op. (Superior Court, January 27, 2006) 6

Commonwealth v. Yacoubian, 489 A.2d 228 (Pa. Super. 1985) 3

Fay v. Noia, 372 U.S. 391 (1963) 10

Fiore v. White, 562 Pa. 634, 757 A.2d 842 (2000) 3

McKeever v. Warden ..... *passim*

United States v. Barren, 172 F. 3d 1153 (9th Cir. 1999) 14

United States v. Bradley, 381 F. 3d 641 (7th cir. 2004) 14

United States v. Bunner, 134 F. 3d 1000 (10th Cir. 1998) 14

United States v. Sandles, 80 F. 3d 1145 (7th Cir. 1996) 14

United States v. Williams, 198 F.3d 988 (7th Cir. 1999) 14

Wainwright v. Sykes, 433 U.S. 72 (1977) 10

Statutes

18 Pa.C.S. §911 ..... *passim*

28 U.S.C. §2254 ..... 9, 15

42 Pa.C.S. §9541 ..... 3, 6

COUNTER-STATEMENT OF THE CASE

In 1995, Victor McKeever was charged by the Commonwealth of Pennsylvania with numerous offenses pertaining to the distribution of heroin and two counts of corrupt organizations, 18 Pa.C.S. §911(b)(3) and (b)(4)(West 2007), alleging his participation in an organization solely devoted to the distribution of heroin. McKeever pled guilty to all counts. The Commonwealth agreed that counts 2 and 3 (corrupt organizations and corrupt organizations conspiracy) would merge for sentencing and further agreed not to object if the sentences imposed on Counts 1, 2, 3 and 4 were concurrent with each other and remaining counts. These were the only negotiated terms of the plea agreement. Appendix 35a -36a.

McKeever was sentenced July 24, 1995, to a prison term of 15 to 24 years. On merged charges of corrupt

organizations, McKeever received a one to seven year sentence imposed concurrently with a two to seven year sentence on Count 5, delivery of 40 bags of heroin. The sentence on Count 5 was to be served consecutive to a sentence imposed on a different state conviction. Sentences on five other counts of drug delivery and one count of dealing in proceeds of unlawful activity were imposed consecutively to each other.

In 1996 the Pennsylvania Supreme Court held that Pennsylvania's corrupt organizations statute, 18 Pa.C.S. §911, was not intended to reach organizations whose sole purpose was the conduct of illegal activities. *Commonwealth v. Besch*, 674 A. 2d 655 (Pa. 1996). Prior to *Besch*, controlling Pennsylvania law held that prosecution for corrupt organizations would extend to an "enterprise" dedicated solely to

illegitimate purposes. *Commonwealth v. Yacoubian*, 489 A.2d 228 (Pa. Super. 1985). Construction of a statute by the Pennsylvania Supreme Court relates back to adoption of the statute, *Fiore v. White*, 562 Pa. 634, 757 A.2d 842 (2000), so *Besch* was understood as stating the proper interpretation of the corrupt organizations statute from the time the statute was adopted. (The Pennsylvania Legislature has since amended the statute so as to reach both legitimate and wholly illegitimate organizations. 18 Pa. C. S. §911(b)(3)(West 2007), as amended June 19, 1996.)

McKeever sought application of *Besch* through the Post Conviction Relief Act (PCRA), 42 Pa.C.S.§9541 *et seq* (West 2007) so as to vacate the convictions of corrupt organizations. The Court of Common Pleas of Erie County dismissed the petition as untimely. The Pennsylvania Superior Court affirmed.

Commonwealth v. McKeever, No. 1051 WDA 2003, slip op. (February 20, 2004 Pa. Super)(memorandum). *See* Appendix 36a.

McKeever filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania wherein he asserted the conviction was obtained and/or sentence imposed in violation of the Fifth and Fourteenth Amendment rights to due process and equal protection, the Eighth Amendment guarantee to be free of cruel and unusual punishment and the Sixth Amendment right to effective assistance of counsel. The Federal Magistrate found "actual innocence" excused the lack of exhaustion and procedural default of the claim in state court, and recommended that a writ of habeas corpus issue. Supplemental Appendix 1sa-8sa.

McKeever filed objections, asking that the District

Court additionally rescind the entirety of McKeever's 1995 state court guilty plea. Respondents filed objections to McKeever's request. By order and opinion of March 23, 2005, the District Court adopted the Magistrate's Report and Recommendation and granted the writ of habeas corpus. Appendix 35a-42a. The writ was stayed for a period of 180 days to permit the Court of Common Pleas of Erie County to vacate the convictions of corrupt organizations, 18 Pa. C. S.§911(b)(3) and 911(b)(4), (Counts 2 and 3)and call McKeever for re-sentencing. Appendix 42a.

Through a Motion to Alter Judgment, McKeever again sought a District Court order rescinding the state court plea agreement. The District Court denied the motion. McKeever obtained a certificate of appealability and brought an appeal. The Third Circuit held that the District Court did not err in

granting McKeever's writ of habeas corpus and leaving the remedy to the Commonwealth.

This petition for writ of certiorari then followed.

In response to the United States District Court order, the state trial court vacated the convictions of corrupt organizations, and on April 26, 2005, sentenced McKeever to an aggregate term of 15 to 42 years in prison, and denied various motions filed prior to re-sentencing, including a motion to withdraw the guilty plea. The Pennsylvania Superior Court affirmed the judgment of sentence. *Commonwealth v. McKeever*, No. 880 WDA 2005, slip op. (Superior Court, January 27, 2006)(memorandum). The Pennsylvania Supreme Court denied a petition for allowance of appeal by Order of September 6, 2006, at No. 78 WAL 2006. McKeever then filed a petition under the Post Conviction Relief Act, 42 Pa.C.S. §9541

et seq. (West 2007). The lower court denied relief. Appeal is now pending in the Pennsylvania Superior Court at No. 1631 WDA 2007.

REASONS TO DENY THE WRIT

I. The Third Circuit Opinion Is An Inappropriate Vehicle For Consideration of The Question Posed By Petitioner.

A. The Third Circuit Decision For Which Certiorari Is Sought Did Not Rule On The Question Of When Mutual Mistake of Fact Mandates Rescission Of A Guilty Plea.

McKeever, a state prisoner, obtained a writ of habeas corpus to two counts of corrupt organizations, 18 Pa.C.S. §911(b)(3)and (4)(West 2007) to which he pled guilty. McKeever would have preferred the U.S. District Court to have vacated, or to have directed the state court to vacate, the entirety of his plea agreement, which encompassed pleas to numerous counts of heroin trafficking in addition to the two vacated charges of corrupt organizations. In pursuit of this goal, McKeever asks the Court to grant certiorari to consider "[w]hether a plea agreement

that is based on the parties' mutual mistake about an essential element of charges to which the defendant pled guilty is constitutionally invalid and voidable at the option of the defendant." Petition, Question Presented.

Certiorari to address this question should not be granted because the holding of *McKeever v. Warden* does not turn on the question Petitioner poses.

McKeever held that the District Court did not err granting in a writ of habeas corpus as to two counts of corrupt organizations, 18 Pa.C.S.§911(b)(3)and (b)(4) and leaving the specific remedy to the Commonwealth of Pennsylvania. Petition 15a. *McKeever* obtains from the proper understanding of 28 U.S.C.§ 2254 through which a state prisoner may seek federal habeas relief. Habeas jurisprudence neither requires, nor authorizes, a federal court to

order a state court to fashion a particular remedy. "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; *it cannot revise the state court judgment*; it can act only on the body of the petitioner." *Fay v. Noia*, 372 U.S. 391, 430 (1963)(*emphasis supplied*), overruled in part by *Wainwright v. Sykes*, 433 U.S. 72, 73 (1977)(substituting "cause and prejudice" for "knowing waiver" or "deliberate by-pass" in assessing state prisoner's procedural default of claims in state court); *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

If the vacating of the corrupt organizations convictions and re-sentencing in state court triggered a constitutional infirmity in the remaining guilty plea

(which encompasses numerous heroin trafficking charges), then McKeever was free to raise anew (and, in fact, has raised) such a claim in state court. As of this writing, review of the denial of post conviction relief is pending in the Pennsylvania Superior Court. *Commonwealth v. McKeever*, No. 1631 WDA 2007.

The Third Circuit affirmance of the grant of the writ as ordered by the District Court and the ensuing process in state court comports with principles inherent in federal habeas law. "Because it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, federal courts apply the doctrine of comity, which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty

with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991)(internal citations omitted).

While the Third Circuit engaged in discussion of the question which McKeever now poses, the discussion was entirely unnecessary to the holding and is properly characterized as *obiter dicta*. Because *McKeever v. Warden* turns on application of principles inherent in federal review of a state court conviction and contains no binding authority on rescission of a guilty plea, the Third Circuit determination is an inappropriate vehicle for review of the question of when mutual mistake of fact requires rescission of a guilty plea. For this reason, certiorari should not be granted.

B. Cited Circuit Court Decisions Which Dispose of Claims Of Federal Prisoners On Direct Appeal Are Not In Conflict With The Third Circuit Disposition of The Habeas Petition of State Prisoner McKeever.

This Court will consider a grant of certiorari, "when a United States court of appeals has entered a decision in conflict with another United States Court of Appeal *on the same important matter*." Sup.Ct.R. 10 (emphasis supplied). The cited Seventh, Ninth and Tenth Circuit cases uniformly arise on direct review of a federal conviction. The relief obtained by state prisoner McKeever in the Third Circuit turns on principles of federalism and comity inherent in federal review of state court convictions. Consequently, *McKeever v. Warden* does not concern the "same important matter" as cited decisions from the Seventh, Ninth and Tenth circuits. Petition, pp. 8-14.

Accordingly, the Third Circuit determination is not in conflict with cited decisions of sister circuits. *See e.g, United States v. Bradley*, 381 F. 3d 641 (7th cir. 2004) (motion to withdraw federal guilty plea); *United States v. Williams*, 198 F.3d 988 (7th Cir. 1999)(direct appeal of federal conviction); *United States v. Sandles*, 80 F. 3d 1145 (7th Cir. 1996)(direct appeal of federal conviction); *United States v. Barren*, 172 F. 3d 1153 (9th Cir. 1999)(*en banc*)(motion to vacate sentence on federal conviction); *United States v. Bunner*, 134 F. 3d 1000 (10th Cir. 1998)(appeal from entry of federal guilty plea).

C. Cited State Court Decisions Are Not In Conflict With the Third Circuit Decision For Which Review Is Sought.

McKeever v. Warden is not, as Petitioner asserts, in conflict with cited state appellate court decisions,

Petition 14, nor is any such conflict possible. *McKeever v. Warden* is brought under 28 U.S.C. §2254. In *McKeever*, the Third Circuit considered the proper scope of relief obtainable by a state prisoner seeking writ of habeas corpus pursuant to 28 U.S.C. §2254, and nothing more. No state court appellate decision would ever have cause to consider, and rule on, the scope of relief obtainable by application of 28 U.S.C. § 2254. Because the holdings of cited state court decisions and the holding of *McKeever v. Warden* turn on entirely different bodies of law, no conflict exists between the cited state cases and *McKeever*.

D. Regardless of Whether The Question As Framed By the Petitioner Is A Matter of Importance to Both State and Federal Criminal Justice Systems, The Holding Of The Decision For Which Review is Sought Does Not Turn On The Question Posed.

Finally, McKeever urges that certiorari be granted because the question he poses is "exceptionally important to state and federal criminal justice systems." Petition 23. The question of whether, or when, mutual mistake may render a guilty plea constitutionally invalid may well be a question of importance to state and federal courts; however, the decision for which certiorari is sought is not the proper vehicle for consideration of this issue.

As Respondents have discussed throughout, the holding of *McKeever v. Warden* is discrete and limited to application of federal habeas law as set out at 28 U.S.C.§2254. "We hold that the District Court did not err in granting McKeever's writ of habeas corpus and leaving the remedy to the Commonwealth." Petition, 15a. *McKeever v. Warden* is a wholly inadequate vehicle for consideration of the question which

Petitioner poses: Whether a plea agreement that is based on the parties' mutual mistake about an essential element of charges as to which the defendant pled guilty is constitutionally invalid and voidable at the option of the defendant." Petition, Question Presented.

CONCLUSION

McKeever v. Warden presents no constitutional infirmity requiring the corrective process of this Court. Moreover, the holding of *McKeever* does not turn on the question which Petitioner poses. Respondents ask the Court to deny the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

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